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BY

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"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ᾽ὀρθῶς ἔχον ὀφθῃ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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THE NATURE OF A CRIME.

[*Contributed by* PROFESSOR CARLETON KEMP ALLEN.]

Interrelation of Different Kinds of Legal Wrongs. — Nothing in jurisprudence has led to more inconclusive discussion than the true ground of distinction between tort and crime. The breach of legal duty is wrongful, whatever the duty may be. It is wrongful to break a contract : but there are only two or three cases in English law in which breach of contract is a crime. They are all modern. They occur in connexion with the contract of service and industrial disputes, and they contemplate circumstances in which the wilful and malicious breach of a contract of service would involve serious danger to life or property.[1] So far as I can discover there are no reported convictions for any of these statutory offences.

Tort is, by its very name, wrongful and is nearly always criminal as well ; but not invariably. It is wrongful to subject one's neighbour to a nuisance ; but this is not criminal, unless the general public is affected. Slander is wrongful, but it is not indictable, unless it tends to an immediate breach of the peace, or is blasphemous or seditious. Why is it actionable and not punishable ? And why are so many wrongs both actionable *and* punishable ?

The answer is not easy, either in theory or practice. It is not only that in juristic doctrine endless technical distinctions may be drawn without ever arriving at anything which satisfies the mind as a real *difference* ; but even in their practical legal effects it is not always easy to disentangle these various kinds of wrongs one from another. Probably the most nebulous part of our law of torts is that debatable land where contract merges in tort and tort in contract ; it is sometimes almost impossible to distinguish between the " common law " involuntary duty which is imposed by the general law of torts and the localized, voluntary duty which is undertaken by a contract. It requires, for example, a considerable effort of ingenuity to distinguish satisfactorily between the grounds of the decision in two cases like *Jennings* v. *Rundall* (1799), 8 T.R. 335, and *Burnard* v. *Haggis* (1863), 14 C.B.N.S. 45.

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[1] Archbold, *Criminal Pleading, Evidence and Practice* (27th ed.), 1286. See Conspiracy and Protection of Property Act, 1875, s. 5 and s. 7 (supplying gas and water), Halsbury, *Laws of England*, ix, § 1143, and Trades Disputes Act, 1927, s. 6 (4) (employees of local public authorities).

The affinity between tort and crime is not in the least surprising when we remember how late in the history of law there emerged any clear conception of a difference between them. That is a commonplace of legal history : it has often been described, and never more graphically than by Maine in the last chapter of " Ancient Law." All readers of that remarkable book will remember how slowly and how clumsily the Romans, for all their legal genius, developed a body of law which we should recognize nowadays as distinctively " criminal." It seems that the primitive elements of criminal law are slower to disappear than the primitive elements of any other branch of law—as we are reminded when we recall that such institutions as *peine forte et dure* did not disappear from English society until the eighteenth century, nor the appeal of felony and the deodand until the nineteenth century. The slowness of the growth of criminal law is doubtless due to the fact that it is largely and inevitably concerned with the old Adam, both in the criminal and in the avenger of crime ; and Adam changes little in the course of the ages. In the highly civilized days of Justinian we find, still vigorously persisting in one of the commonest offences—theft—what seems to us to be an extraordinary medley of private restitution and public sanction : and in that one " delict " (which we nowadays consider emphatically a crime), with its distinctions between different kinds of wrongful contrectation and asportation : its distinction, too, between the surreptitious theft, which roused no angry passions until after the event, and the manifest theft which invited immediate violent vengeance ; and in the substitution of predetermined penalties in place of the savage punishments of the older law :—in this one delict we may see an epitome of the whole development of criminal law in maturing societies. In the broadest terms, with the exception of those crimes against the security of the State which were always the concern of the people as a whole—high treason, *maiestas* and *perduellio*—we may say that the history of Roman criminal law is the very gradual and very imperfect emergence of public discipline out of private retribution, which latter in its turn was probably preceded by corporate retribution in the shape of the clan-feud, at all events when blood was shed.

Historical Relationship between Crime and Tort in English Law.— The same, indeed, may be said of criminal law the world over; and yet it is a curious circumstance that at one stage in our own legal history exactly the reverse process seems to have been taking place.[1] Everybody knows that in Anglo-Saxon times the old blood-feud, which probably had become an intolerable and an exhausting nuisance, was succeeded by a system of *wer* and *bót*, very characteristic of Germanic peoples, as we know from Tacitus. The wrongdoer could buy off his wrong by paying the *wer*, the value of a slain man's status, or the *bót*, the compensation, elaborately assessed in legal codes, for injury done to person or property. The system still flourishes in many parts of the world; it is, for example, in full vigour in Abyssinia (a Christian country). But this was by no means the whole of penal law. The malefactor could not, like the celebrated Roman wag who went about striking passers-by with a rope's end, or like the intruder of modern times who tenders a shilling for his technical trespass, indulge whatever criminal whims he chose if he was prepared to pay for them. To begin with, there were certain grievous offences for which no *bót* could atone. They struck too deep at the foundations of society to be reduced to terms of cash. Again, there was a fearful penalty for those—and they must have been numerous—who could not find *wer* or *bót*: they were outlawed beyond the pale, and became not only the rightless outcasts but the common enemies of society. And over and above this, there was the punitive power of the King. *Bót* was not all that the offender might have to pay: there was *wite* also for the King or for some other public guardian of the peace: and there is evidence that the *wite* was often so heavy that the ordinary wrongdoer had little hope of paying it, and was obliged to suffer imprisonment, or worse, for his default.[2] "Vengeance is mine" was certainly a watchword of the Norman and Angevin kings, and it was a very swift and terrible vengeance, visiting upon the criminal not only loss of life or liberty, but every form of torment which the body could endure. If we may add another Scriptural quotation, the wages of sin was death, or mutilation, or both.

Now this power of punishment, in life and limb or in money, over and above private satisfaction, was jealously preserved and steadily extended. "Perhaps," says Maitland,[3] "there never was a time in this country when the community did not inflict punishment upon, as distinguished from declaring outlawry against, certain criminals." Maitland's picture of English criminal law in the twelfth century is extraordinarily different from that of the criminal law before the Conquest. The King's Peace becomes "an all-embracing atmosphere." Outlawry—always a desperate expedient which really confesses the inability of society to cope with its criminals—is no longer an *ex post facto* punishment, but a process for compelling attendance. It is to the King, or to the King's officer, the sheriff, or to the lord in the court of leet, or to the hundred in the local court, that the wrongdoer is answerable—answerable in many ways, in life and limb, in liberty, and in money, whether it be heavy fine or trifling amercement. More—each locality becomes responsible for the repression of its own malefactors; His Majesty's Justices in Eyre will make close inquiry into misdemeanours committed within the district and will need to be amply satisfied that evildoing has been adequately atoned—of course in cash, for it is in the financial aspect of crime that the King is particularly interested. It is important to remind ourselves of this all-pervading, direct relationship, in medieval times, between the individual liegeman and public authority. Setting aside that large and complicated body of rules which govern the tenure of real property, the general law of the land which governs the individual in his daily doings is what we should nowadays call criminal law. The ordinary action for damages *inter partes*: the conception, in short, that for injury done a specific plaintiff has a claim for compensation against a specific defendant: this is practically unknown. It is otherwise, however, when a man asks for the due restitution of a thing which is his, or when he asks to be put back in possession of the tenement of which he has been wrongfully deforced. "When we look back to the first age of royal justice we see it doing little else than punishing crime and giving specific relief." [1]

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[1] Pollock and Maitland, *History of English Law* (hereinafter referred to as *P. & M.*), ii, p. 448.

[2] *P. & M.*, ii, p. 460.

[3] *Ibid.*, p. 451.

The King's peace is still "an all-embracing atmosphere." It is not too much to say that the whole group of rights and wrongs which make up torts, contracts and crimes have their origin, I will not say in "criminal law," for that is to beg the question, but in a system of rules which nowadays we should consider essentially "criminal." The starting-point of them all is that force is the monopoly of the State. Any unauthorized private exercise of force, to persons, to things or to land, is punishable wrong. This is trespass, which, as we know from our Bible, is only another name for wrongdoing or sin. Out of this master-principle, when it becomes inadequate by itself to cover multiplying legal relationships, spring those "actions on the case in the nature of trespass" which are to form so large a part of the law of torts. They are very far indeed, in actual effect, from wrongdoing *vi et armis*; none the less, trespass is their parent. One of these actions upon the case concerns the wrong of doing ill, or altogether failing to do, what one has undertaken to do; it becomes assumpsit and supplies an action upon a promise which has not been fortified with the sacrament of sealing and delivering. Disturbance of the King's Peace—wrong not to the rights of an individual but to the disciplinary sovereign of society itself—is the *primum mobile* of all these large and vital departments of the Common Law.

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[1] *P. & M.*, ii, p. 523.

It would seem, then, that in the incalculable actions and reactions of history, crime sometimes springs out of tort and tort sometimes springs out of crime. Whichever of these two processes prevails, the connexion between the two forms of wrong is perpetual and inseverable.

Formal Distinctions between Crime and Tort.—But there is a difference between them, and we must try to discover it. It is needless to consider all the distinctions which have been drawn, because a great many of them seem to be concerned with incidentals, rather than with essentials. For example, Professor Kenny, in the first chapter of his *Outlines of Criminal Law*, experiments with one suggested distinction after another, but is bothered to death, if I may use the expression without disrespect, by the existence of that curious kind of procedure known as the "penal action"—an action which has for its object pecuniary punishment, payable, however, not to the State, but to the prosecutor or informer. Again and again Professor Kenny finds it impossible to fit the penal action into a scheme which otherwise seems satisfactory. But is it not an excess of exactitude to allow any juristic distinction whatever to depend upon the existence of a freak like the penal action? It is a hybrid and an anomaly, and all that need be said about it is that it is a criminal form of action in which the State, either to stimulate vigilance or to relieve itself of certain police duties, makes an exception to the general mode of payment of penalties. It is now, for all practical purposes, dead; and the only thing to do with the corpse is to pickle it in spirits and put it in an obscure corner of the legal museum as a curious and now unimportant specimen.

1. *Procedure.*—Let me take another example of the kind of

tantalizing reasoning which has luxuriated in this field. It is often said that the only real distinction between tort and crime is one of procedure. The "manager" of the action in the one case is a private individual, in the other case it is the State. To this it is objected that there are many occasions in criminal law when the "manager" is a private prosecutor: and indeed any person whatever may prosecute an indictable offence. Now, for reasons which will be stated presently, it is not here conceded that procedure forms the sole or even the principal difference between tort and crime: but it is certainly a difference, and a genuine one—formal, however, and not material: and to dismiss it on account of the private prosecutor is highly unconvincing. For in reality the private prosecutor is nothing better than an informant or complainant. The crown may permit an individual to set the machinery of criminal justice in motion, but it remains absolute master of that machinery, and the prosecutor has no right to demand the punishment of the offender. The Crown may always, by means of the *nolle prosequi*, arrest the machinery—its own machinery—there and then.[1] It is quite otherwise in civil actions. There is no power in the land, short of Parliament, which can prevent a plaintiff from suing for the damages to which he has a reasonable claim. I assume, of course, that the claim is not frivolous; if it be quite empty, then, whether it be vexatious action or vexatious indictment, it goes without saying that it will never come to trial.

It is the fact last-mentioned, viz. that the Crown or State always remains master of criminal proceedings, which in Austin's view[2] constitutes the only real difference between tort and crime. He insists that there is no distinction in the *quality* or *tendency* of the two things. Wrong is wrong: a tort may do far more actual damage than a crime, and its tendency may be just as dangerous as that of a crime: and the traditional Roman distinction between the "public" and the "private" offence is (he holds) unreal, because ultimately all legal wrongs, however limited in their actual effects, are detrimental to the public interest. But he sees a substantial difference in the fact that in the one case the person who is graphically called in Scots law the "pursuer" is a private individual, in the other case it is the State. "Where the wrong is a civil injury," Austin sums up,[1] "the sanction is enforced at the discretion of the party whose right has been violated. Where the wrong is a crime, the sanction is enforced at the discretion of the sovereign." If I have successfully followed Professor Kenny into, through and out of the maze into which he leads us, I understand this to be also the view of that learned and entertaining author, who adds that the Crown has not only the monopoly of "pursuing," but of remitting the pursuit and pardoning the pursued.

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[1] In addition, there are a considerable number of offences as to which no private person may prefer an indictment unless (1) he is bound by recognizance to prosecute or give evidence, or (2) the accused is in custody or is bound over, or (3) the indictment is authorized by a judge, a law officer of the Crown, or certain other public functionaries: Vexatious Indictments Act, 1859, s. 1.

[2] Lect. XXVII.

2. *Retribution versus Restitution.*—Austin discusses another distinction which is commonly made. The object of every civil action is the payment of damages to an individual. There is, no doubt, an added penal sanction: if the losing party contumaciously refuses to pay what he is condemned to pay, he may be imprisoned or otherwise constrained: but this is merely supplementary machinery to effect the principal purpose, viz. the *restitutio in integrum* of a wronged individual. The object of criminal prosecution, on the other hand, is to punish. If the penalty is pecuniary, nobody gains except the public exchequer; if it is not pecuniary, nobody gains at all—indeed, the community, which unhappily has to maintain prisons, is a loser. Having mentioned this apparent distinction between *restitution* and *deterrence*, Austin expresses his dissatisfaction with it, on two grounds. First, because the "remote end" of enforcing *all* liability, whether civil or criminal, is the prevention of offences generally. This is true enough, but it only amounts to saying that one of the chief purposes of law is to preserve order in society; we are not in this connexion concerned with the "remote end" of all law whatsoever, but with the very manifest and, I believe, significant difference between the *immediate* ends in view in dealing with these two different kinds of wrong. Second, Austin observes that in certain kinds of criminal prosecutions, it is an individual and not the State who is enriched by the penalty imposed. He is referring to the "penal actions," which are such a source of anxiety to Professor Kenny. They were more common in Austin's day than they are at present, but they were always of such an obviously exceptional nature that they had nothing relevant to say to the analysis of the nature of crime.

3. *Punishment the only Ground of Distinction by English Case-law.*—In several important connexions, our courts have had to wrestle with this difficult question of the distinction between civil

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[1] *Loc. cit.*, p. 518 (Campbell's ed.).

and criminal liability. Before the Criminal Evidence Act, 1898, a prisoner could not give evidence on his own behalf, and it was sometimes of much moment to decide the exact nature of the cause before the court, for if it were civil, the defendant could give evidence in support of his own case,[1] and if it were criminal, he could not.[2] Little enlightenment upon the true ground of the distinction is to be derived from the case-law on this topic, so far as I have examined it. In another association, which has proved to be very troublesome, the question has been constantly before the courts since 1873. At that date, criminal appeals, such as they were, were the province of the Court of Crown Cases Reserved, and it was desired to maintain that system when the courts were reorganized and the jurisdiction of appeals was reformed by the Judicature Act, 1873. Accordingly, it was provided by s. 47 (now re-enacted by the Judicature Act, 1925, s. 31 (1) (*a*)) that no appeal should lie to the ordinary Courts of Appeal of the Supreme Court in "any criminal cause or matter." In case after case the Court of Appeal and the House of Lords have had to ask themselves exactly what the Act means by that expression. Anybody who examines the large number of these decisions will regretfully come to the conclusion that the amount of illumination is in inverse ratio to the effort of inquiry.[3] And this, though disappointing, is not surprising. Well knowing the idiosyncrasies, often in the nature of historical survivals, of our unkempt criminal law, our judges have hesitated to essay anything like a watertight definition of crime. Nobody, indeed, will ever be able to attempt it except a codifier who has a charter to fashion the whole existing system into something resembling shape and consistency. It is one of the most depressing commentaries on democratic parliamentary government that while this imperative social measure has been advocated for centuries by one competent critic after another, political exigencies have apparently never permitted time for it. Whatever merits our system of precedent-law may possess—and they are great—the huge case-law which, in the absence of scientific legislation, has grown up round Common Law and statutory felonies and misdemeanours has led to at least as much darkening of counsel as lightening of darkness.

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[1] After the Evidence Act, 1857 (Lord Brougham's Act).

[2] See, *e.g.*, *Parker* v. *Green* (1862), 2 B. & S. 299; *R.* v. *Sullivan* (1874), 8 I.R.C.L. 404.

[3] For the benefit of any who may desire to investigate the matter further, and since it has been found necessary to collect, not without difficulty, the decisions from different sources, I append a list of the principal cases in chronological order: *R.* v. *Master*, (1868) L.R. 4 Q.B. 285; *Mellor* v. *Denham*, (1879) 5 Q.B.D. 467; *R.* v. *Whitchurch*, (1880) 7 Q.B.D. 534; *Ex p. Woodhall*, (1888) 20 Q.B.D. 832; *R.* v. *Barnardo*, (1889) 23 Q.B.D. 305; *Cox* v. *Hakes*, (1890) 15 App. Cas. 506; *Ex p. Schofield*, [1891] 2 Q.B. 428; *Ex p. Pulbrook*, [1892] 1 Q.B. 86; *Seaman* v. *Burley*, [1896] 2 Q.B. 344; *Derby Corporation* v. *Derbyshire C.C.*, [1897] A.C. 550; *Robson* v. *Biggar*, [1908] 1 K.B. 672; *R.* v. *Governor of Brixton Prison, Ex p. Savarkar*, [1910] 2 K.B. 1056; *R.* v. *Wiltshire Justices, Ex p. Jay*, [1912] 1 K.B. 566; *Scott* v. *Scott*, [1913] A.C. 417; *R.* v. *Garrett*, [1917] 2 K.B. 99; *Re Clifford and O'Sullivan*, [1921] 2 A.C. 570; *R.* v. *Secretary of State for Home Affairs, Ex p. O'Brien*, [1923] A.C. 603.

The only sure principle which seems to emerge from these cases concerning s. 47 of the Judicature Act is that the test of criminality is *punishment.* The most authoritative decision in the group is *Clifford and O'Sullivan*, [1921] 2 A.C. 570, in which case the Lord Chancellor (Lord Cave) attempted to establish a convenient working test. He found it [1] in two considerations: the matter in question "must involve the consideration of some charge of crime, that is to say, of an offence against the public law; and that charge must have been preferred or be about to be preferred before some court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence." It is unnecessary to observe that the first branch of this dictum leaves us exactly where we were, for to describe a crime as "an offence against the public law" explains nothing whatever. But the test of punishment is at least tangible and recognizable.[2] In conformity with it, the term "criminal" has been applied, within the meaning of the Judicature Act, to matters as diverse as the following: disobedience to by-laws of a school constituted under the Elementary Education Act, 1874,[3] disobedience to an order made by Justices under the Public Health Act, 1875, to fill up an ash-pit,[4] disobedience to a magistrate's order to abate a nuisance.[5] *R.* v. *Fletcher*, (1876) 2 Q.B.D. 43 was an interesting case on the border-line between civil and criminal proceedings. The matter in question was trespassing by day in pursuit of game, and the justices, upon summary conviction, had imposed on the defendant a penalty of one shilling and costs. It was contended that the action was in substance only a form of procedure for the protection of private property, the defendant having (it was claimed) acted under a *bona fide* claim of right; but the Court of Appeal held it to be a criminal cause or matter. It was early laid down,[1] and has constantly been reasserted, that the statutory phrase " criminal cause or matter " is to be given a wide interpretation; but the test of punishment seems to be the only one which has been consistently and satisfactorily applied. An attempt has been made, for example, to reduce the question to one of procedure, and it has been held by several judges that the only matter to be considered is whether the appeal then before the court arose in the first instance from civil or criminal *proceedings*.[2] But this test is manifestly unsatisfactory, for it entirely begs the question, What are criminal and what are civil proceedings? which, in its turn, must depend upon the initial question, What is a crime and what is a civil cause of action? Its imperfection is illustrated by the fact that in the attempt to apply it, no difference has been recognized between the substantive question of what constitutes a criminal cause or matter and the adjective question whether a particular court has *jurisdiction* to entertain a criminal cause or matter—two perfectly distinct inquiries.[3] It is not easy to see why an application for a writ of prohibition to restrain an inferior court from entertaining a criminal charge which it has no jurisdiction to entertain should be an *appeal from* a criminal cause or matter.

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[1] At p. 580.

[2] It merely adds unnecessary confusion to enter into refinements as to what amounts and what does not amount to punishment. It is pointed out by Lord Herschell in *Derby Corporation* v. *Derbyshire C.C.*, [1897] A.C. 550, that in one sense, all legal proceedings *may* end in a penalty. But anybody who does not wish merely to chop logic will see a difference between a penalty for non-compliance with a judgment and a punishment directly imposed upon a convicted person.

[3] *Mellor* v. *Denham*, (1879) 5 Q.B.D. 467.

[4] *R.* v. *Whitchurch*, (1880) 7 Q.B.D. 534.

[5] *Ex p. Schofield*, [1891] 2 Q.B. 428.

Material Distinction between Crime and Tort: Repression of Injurious Acts (a Principle of Social Security) and Private Restitutio in Integrum (a Principle of Remedial Justice).—We may safely take it, then, that in English case-law the distinguishing mark, *par excellence*, of a crime is that it involves liability to punishment. But that is not more than a distinguishing mark: it does not explain the thing itself. Any description of crime which centres either in procedure or in the fact of punishment amounts only to a formal, not to a material definition. It is not enough to know that crime is punishable wrong; the problem is, why is it punishable? Why, in other words, does the State consider it necessary, in the case of some wrongs but not of others, to take direct disciplinary action?

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[1] *Ex p. Woodhall*, (1888) 20 Q.B.D. 832.

[2] See, *e.g.*, per Cotton, L. J., in *R.* v. *Barnardo*, (1889) 23 Q.B.D. 305, and per Kay, J., in *Seaman* v. *Burley*, [1896] 2 Q.B. 344.

[3] See per Bankes, L. J., in *R.* v. *Garrett*, [1917] 2 K.B. 99, and per Lord Sumner in *Clifford and O'Sullivan*, *ubi sup*. A number of decisions, however, have turned purely on points of procedure. Thus in *Ex p. Pulbrook*, [1892] 1 Q.B. 86, the order of a Judge in Chambers authorizing (as is required by the Law of Libel Amendment Act, 1888), a prosecution for criminal libel against the editor of a newspaper was held to be a criminal cause or matter; in *R.* v. *Wiltshire Justices, Ex p. Jay*, [1912] 1 K.B. 566, Jay, having given notice of appeal against a summary conviction for wilful damage to property, did not prosecute the appeal and was ordered by Quarter Sessions to pay costs, and this was held to be a criminal cause or matter; and in *R.* v. *Governor of Brixton Prison, Ex p. Savarkar*, [1910] 2 K.B. 1056, the refusal of a divisional court to issue a writ of habeas corpus in the case of a prisoner committed under the Fugitive Offenders Act, 1881, was held to be unappealable. To what extent the criminal nature of a charge affects the right to appeal in respect of habeas corpus is discussed in *R.* v. *Barnardo*, *ubi sup.*, and in the great case of *R.* v. *Secretary of State for Home Affairs, Ex p. O'Brien*, [1923] A.C. 603 and [1923] 2 K.B. 361.

I believe the true answer is the one which is rejected by Austin and Dr. Kenny. Crime is crime because it consists in wrongdoing which directly and in a serious degree threatens the security or well-being of society, and because it is not safe to leave it redressable only by compensation of the party injured. Wronged individuals are sometimes timid, sometimes supine, sometimes lazy, sometimes unable for one cause or another to pursue their remedy; the suppression of injurious wrong-doing must not be left at the mercy of such accidents, but must be controlled by some public authority more powerful and less erratic than the private plaintiff. Besides, there are a great many kinds of actions which do not injure any specific person at all, or at all events injure all persons equally, and for these there are no private remedies, for the excellent reason that they are not private wrongs. If the State does not take measures to suppress them, nobody else will or can.

This is not only the simple common sense of the matter—and I hope it is not too dogmatic to say that if it were not for endless technical distinctions ordinary plain intelligence would never doubt it—but it is, in my submission, the accepted view of English law. Turning to the Pandects of English law, by which I mean that extraordinary work, Halsbury's *Laws of England*,[1] I find a crime thus defined: "A crime is an unlawful act or default which is an offence against the public, and renders the person guilty of the act or default liable to legal punishment. While a crime is often also an injury to a private person, who has a remedy in a civil action, it is as an act or default contrary to the order, peace and well-being of society that a crime is punishable by the State." And a note adds, very pertinently, that this fundamental element of crime was very well evidenced by the fact that the old form of indictment always concluded with the solemn denunciation that the offence was an injury to the peace and the Crown and the dignity of our Lord the King. One cannot help casting a longing, lingering look on that old ritual, for it was a reminder of that interesting historical fact of which mention has already been made—viz. that much of our law of wrongs and remedies drew its nourishment from "the all-embracing atmosphere" of the King's Peace. And indeed the whole history not only of English but of all civilized criminal law teaches us the same lesson; wrongs become crimes only when the State, outgrowing infancy, is strong enough and alert enough and conscious enough of its obligations to its members to take measures of punishment against crime, not *instead of* (as seems frequently to be suggested), but *in addition to*, private restitution.

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[1] ix, § 499.

1. *Objection—All Wrongs are injurious to the Community.*—But it is objected that every wrong is a wrong to the community. So, indeed, it is; it is more: it is an offence against humanity at large and the destiny of the whole human race. The naughty boy who climbs over a wall and steals an apple has undoubtedly done an injury to society and to humanity. But nobody with a sense of proportion has such a sensitive conscience that he cannot see a difference, from the point of view of the practical needs of society, between the child who steals an apple and the highwayman who murders and robs his victim.

2. *Objection—No Difference in Tendency between Criminal and Civil Wrong.*—And again it is objected that there is no difference between civil wrong and criminal wrong in quality and tendency. It is impossible, urges Austin, to say that crime is always and necessarily more harmful than tort. This is unquestionable. A moment of inattention on the part of an engine-driver may work more havoc than the life-long activities of a murderer as implacable as Charles Peace or William Palmer; negligent incompetence on the part of a banker or financier may cause greater ravages to property than the depredations of a thousand pickpockets and burglars. But what does all this prove? It seems intended to prove that crime and tort are two totally different kinds of wrongs. They are nothing of the kind. Crime and tort are complementary, not mutually exclusive. A wrong does not become two different kinds of wrong because it gives rise to two separate legal processes, one by way of punishment and the other by way of compensation. Setting aside the large class of crimes which do not affect private rights at all—to these I will advert presently—nearly all crimes to person or property are also torts. Indeed, I can think of only one exception—homicide. There is an obvious reason why the slain

cannot sue the slayer; there is no obvious reason why the executor of the slain should not sue the slayer, and he could certainly do so in England, as he can in many other countries, if it were not for a mysterious rule of the Common Law which can only be accepted as a fact without being justified as a principle. Conversely, a great many torts are also " private " crimes to person or property. But this is not universally true, for a reason which leaps to the eyes. When the tort belongs to that class in which liability does not depend upon blameworthiness but simply on the principle of *restitutio in integrum*, there is not necessarily a crime, for many crimes involve actual guilty intent. Thus the thief has unquestionably committed conversion, but he who asports and " casually loses " my umbrella by innocent inadvertence is not a thief. In general, it may be said that those civil wrongs which may be classified as torts of unjustifiable *aggression* are also crimes;[1] those which are usually described as of " absolute liability " are not crimes. These last are not " wrongs " at all, in the ordinary, non-legal acceptation of the word; they are classed as tortious wrongs, and must be considered in any analysis of civil liability, because in their results, and in the procedure provided by law to repair those results, they are closely akin to what we may tautologously call the " wrongful wrongs."

Two Aspects of Criminal Liability—Intrinsic Wrongfulness and Social Expediency.—This last consideration suggests that there is something more in the notion of crime than a mere breach of a legal rule. There is a strong element of morality in the wrongfulness of crime, and upon that moral element depends, in no small measure, the " public " aspect of crime—the belief that crime is an offence not merely against one but against all. Throughout the whole jurisprudence of crime we can distinguish two powerful currents of quite different natures, springing from different sources. They are the two elements of *intrinsic wrongfulness* and *social expediency*. The first is, I believe, historically the elder, though concerning that question there is much controversy and little certainty; but of the two, in modern societies the principle of social expediency is that which predominates. That is to say, although intrinsic wrongfulness, in the moral sense, is a characteristic of many crimes (as it is of many torts), they are punished not merely because they are wrongful, but because they are wrongful in a degree which is a menace to society. On the other hand, there are many prohibitions of criminal law which have nothing to do with intrinsic rightfulness or wrongfulness; they are prompted by considerations of social expediency more artificial and less self-evident than the prohibition of the more elementary forms of wrongful aggression. The existence of these two very different classes of offences has led to the troublesome distinction between those crimes in which the *mens rea* is *rea* in the ordinary moral sense, and those in which it consists merely in having done the forbidden thing. In the latter class of offences, *mens rea*, in its native meaning, becomes little more than a fiction.

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[1] The " aggressive " element in crime is emphasized in such a well-known analysis of the subject-matter of criminal law as that of Stephen. He finds in nearly all crime an *attack* of one kind or another. " The criminal law is that part of the law which relates to the definition and punishment of acts or omissions which are punished as being (1) attacks upon public order, internal or external; or (2) abuses or obstructions of public authority; or (3) acts injurious to the public in general; or (4) attacks upon the persons of individuals, or upon rights annexed to their persons; or (5) attacks upon the property of individuals or rights connected with, and similar to, rights of property ": *History of the Criminal Law* (hereinafter referred to as *H.C.L.*), i, p. 3.

1. *Intrinsic Wrongfulness.*—If popular language be any guide, it is clear that the word " crime " denotes in its ordinary signification something which shocks deeply rooted instincts. We call a thing a crime when we wish to express the strongest disapprobation of it. The major crimes of " aggression " are undoubtedly, to average moral judgment, peculiarly wrongful and dangerous—perhaps wrongful *because* they are dangerous. This conception of the inherent wrongfulness of crime is well illustrated by a problem of interpretation which has often arisen in connexion with the action of malicious prosecution. That action lies, as everybody knows, for the malicious and reckless setting in motion of *criminal* proceedings or prosecution. What are " criminal " proceedings for this purpose? The courts have declined to limit the meaning of the expression to accusations of offences which are actually punishable by fine, imprisonment, chastisement or death. They refuse to regard as " criminal," in the true sense of the word, proceedings for petty, though punishable, offences—a complaint, for example, under the Public Health Act, 1875, for failing to sweep and garnish a filthy house;[1] they understand by a truly criminal prosecution (according to the leading case) any indictment " involving either scandal to reputation or the possible loss of liberty to the person ";[2] and by an action on the case analogous to that of malicious prosecu-

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[1] *Wiffen* v. *Bailey*, [1915] 1 K.B. 600.

[2] *Quartz Hill Mining Co.* v. *Eyre*, (1883) 11 Q.B.D. 674.

tion (in the strict sense) they have extended the remedy to some (though not all [1]) civil proceedings which involve aspersions on credit, financial, however, rather than moral—*e.g.* bankruptcy and winding-up petitions. At least in this connexion, then, it would seem that our courts detect in " crime," liberally understood, something of a peculiarly disgraceful nature.

(*a*) Mala in se and mala prohibita.—In the seventeenth and eighteenth centuries, nobody would have had any hesitation in saying that these acts of manifest moral wrongfulness were *mala in se*, while other and minor offences, involving no " scandal to reputation " were merely *mala prohibita*. Celebrated cases concerning the sovereign's suspending and dispensing powers turned principally on the distinction between these two kinds of wrongs; those who wish to study the formidable dialectics which they fathered must go to the State Trials and to Vaughan's Reports and read such cases as *Godden* v. *Hales*, 6 St. T. 1165, and *Thomas* v. *Sorrell*, Vau. 330. Blackstone has a good deal to say of the distinction between these two kinds of ills. Crimes and misdemeanours, he tells us,[2] such as murder, theft and perjury, are *mala in se* because they " contract no additional turpitude from being declared unlawful by the inferior legislature." (He means by the " inferior " legislature simply the human lawgiver, the " superior " lawgiver being the Deity Himself). But the lesser, or artificial, kind of *mala* are very different in nature and effect. " In relation to those laws which enjoin only *positive duties*, and forbid only such things as are not *mala in se*, but *mala prohibita* merely, without any intermixture of moral guilt, annexing a penalty for non-compliance, here I apprehend conscience is no further concerned, than by directing a submission to the penalty, in case of our breach of those laws: for otherwise the multitude of penal laws in a state would not only be looked upon as an impolitic, but would also be a very wicked thing; if every such law were a snare for the conscience of the subject." [3] Now, we have all been brought up to regard this distinction between *mala in se* and *mala prohibita* as unsound, exploded and indeed scarcely worthy of serious consideration. We have been taught this for the reason that the seventeenth and eighteenth centuries went much farther than was necessary or defensible in its theories of *mala in se*. Their doctrine was that these wrongs were illegal *because* they were immoral: because, in other words, they had been forbidden by a Divine law which no human authority could possibly abrogate or abridge even if it desired to do so. The notion could not be expressed more neatly than by Blackstone's metaphorical description of the Almighty as a "superior legislature." Nowadays all lawyers and most philosophers are agreed that this position is quite untenable; notoriously it involved its exponents in the most inextricable confusion. But, setting aside the unhappy and fallacious dogma to which it led, the notion of the distinction between *mala in se* and *mala prohibita* is entitled to more respect than it has received. Throughout the criminal law of civilized nations there runs an unmistakable current of belief that certain kinds of conduct require direct repression by the organized force of the State because they are evil in themselves.

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[1] Curiously enough, there seems to be no action for the malicious institution of one kind of civil proceedings in which this remedy would be highly appropriate—*i.e.* an action for deceit, or other civil proceedings involving allegations of fraud.

[2] 1 *Comm.*, p. 54.

[3] *Ibid.*, p. 57.

It is the *mala prohibita* which are the greatest obstacles to any consistent definition of crime in English law. If, as our case-law seems to suggest, the only invariable badge of crime is liability to punishment, then it is, for purposes of technical classification, no less a crime to be without an ash-bin of the pattern prescribed by the County Council than to blow up the Houses of Parliament. Whatever legal terminology may say, common sense simply revolts from such a monstrous use of language. A writer as exact and as "legalistic" as Fitzjames Stephen flatly declines to accept it. Having mentioned [1] the definition of crime as "an act or omission in respect of which legal punishment may be inflicted on the person who is in default either by acting or omitting to act," he proceeds:

> This definition is too wide for practical purposes. If it were applied in its full latitude it would embrace all law whatever, for one specific peculiarity by which law is distinguished from morality is, that law is coercive, and all coercion at some stage involves the possibility of punishment. . . . It would be a violation of the common use of language to describe the law relating to the celebration of marriage, or the Merchant Shipping Act, or the law relating to the registration of births, as branches of the criminal law. Yet the statutes on each of these subjects contain a greater or less number of sanctioning clauses which it is difficult to understand without reference to the whole of the Acts to which they belong. Thus, for instance, it is felony to celebrate marriage otherwise than according to the provisions of certain Acts of Parliament passed in 1823 and 1837, and these provisions form a connected system which cannot be understood without reference to the common law on the subject. These

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[1] *H.C.L.*, i, pp. 1–2.

illustrations (which might be indefinitely multiplied) show that the definition of criminal law suggested above must either be considerably narrowed or must conflict with the common use of language by including many parts of the law to which the expression is not usually applied.

(*b*) Nomenclature of Crimes in English Law.—We are met here by a difficulty which is purely linguistic. In many systems of law, offences of varying degrees of seriousness bear quite different names. For example, the word *crime* to a Frenchman conveys a definite type of grave offence which is triable in a court of assize. Below the degree of *crimes* are offences known as delicts, triable by the Correctional Court, which is only the civil tribunal of the *arrondissement* sitting for the disposal of penal matters. At the bottom of the scale are a large number of petty offences, tried by professional justices of the peace; these are *contraventions*, and liable only to penalties of the most trifling kind. Similarly German law knows three classes of punishable offence—*Uebertretung*, *Vergehen* and *Verbrechen*: and analogous distinctions exist in nearly all European systems. But unhappily in England we have only the single word "crime"—which by derivation signifies nothing more than a charge or accusation—to describe all punishable offences; and these offences are technically divided into four or possibly five kinds—treason, treason-felony, felonies, misdemeanours, and a large class of "contraventions" which go by the clumsy description of "offences punishable on summary conviction."[1]

This awkward classification is based partly on outworn historical distinctions and partly on procedure. "Felony" in the Middle Ages meant what it still means in common speech—viz. a particularly grievous kind of criminal offence. Its gravity was shown by the fact that it was punishable by loss of life or member (or by outlawry if the offender fled from justice), and by a penalty which many a felon, if he had any tenderness for his family, feared even more than death—viz. total forfeiture of his property. There were comparatively few of these heavy iniquities: Maitland tells us[2] that in the twelfth century there were only seven—deadly sins, as it were—which were treason, homicide, arson, rape, robbery, burglary and grand larceny. In the course of centuries, felonies spawned and multiplied: the savage penalties to which they were subject lived on: until, by the beginning of the nineteenth century, there were more than two hundred capital crimes. I repeat that criminal law is the most reactionary of all branches of law: to modern eyes the English criminal law which was still in full vigour when Queen Victoria came to the throne seems an incredible relic of barbarism: and the only thing to be said for it is that it was, on the whole, less ferocious than the criminal law of most other European countries.

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[1] In its strictest technical meaning, the term "misdemeanour" embraces *all* punishable offences below the degree of felony: see *Russell on Crimes* (8th ed.), 10. But this is not its common acceptation.

[2] *P. & M.*, p. 511.

When felonies ceased to be crimes characterized by capital penalty, forfeiture, outlawry and the old process of "appeal," and the inability of the accused to be represented by counsel (which did not apply to misdemeanours), they ceased to have any real meaning in our law as a separate class of crimes. The differences which now exist between felony and misdemeanour are technical, archaic, irrational and valueless. Their abolition has been advocated again and again, but they are still with us, and until they disappear it is quite impossible to devise any single, consistent definition of a crime in English law. Certainly the distinction is not one of kind: nor is it even one of degree. It is still true that the most serious crimes are felonies: but it is impossible to say, conversely, that a misdemeanour is *eo ipso* an offence in the second grade of gravity, like the French delict. It is largely a matter of chance whether any given offence is, technically, a felony or a misdemeanour; and this because statute, which now governs the larger part of criminal law, has been extraordinarily indiscriminate in the creation of new felonies and misdemeanours.

2. *Social Expediency.*—In most felonies and misdemeanours it is easy to see an element of inherent wrongfulness. Not invariably: to borrow Stephen's example, it is felony to celebrate a marriage in an irregular form, but it would be difficult even for Chief Justice Vaughan to see in this statutory offence a *malum in se* comparable with wilful murder. However, if we leave room for numerous and erratic exceptions, we may say broadly that the more heavily punishable offences are ills-in-themselves according to average moral judgment. But there are in modern States a very large number of punishable offences which it is impossible to regard as intrinsically flagitious. They are offences which are dictated solely by considerations of social expediency.

In one sense, all criminal law is dictated by such considerations. We no longer consider that the prohibition of *mala in se* is merely a declaration of a pre-existing natural law: we do not, in other words, say that attacks on person or property are forbidden solely because they are morally wrongful: they are forbidden because they are morally wrongful in a manner and degree which are manifestly prejudicial to the interests of society. Not all moral wrongdoing is deemed to be injurious to this extent: there is no secular penalty, for example, for sexual incontinence: but such moral wrongdoing as, in the view of law, operates directly to the detriment of society in general is criminal. It may be socially dangerous for one of two reasons—either because it attacks the persons or property of individuals (who nearly always have a private remedy in addition) in such a manner as to cause alarm to other individuals; or because it attacks some vital part of the organization of the State. In addition, there are a large number of acts, chiefly but by no means all in the nature of "contraventions" punishable by summary jurisdiction, which are not necessarily wrongful in themselves, but are inexpedient, and therefore penalized, because they interfere with some part of the State machinery. There may be many reasons, economic, political, administrative, cultural, hygienic, which make such acts undesirable; and it is one of the least pleasing features of the modern law of petty offences that as the machinery of government becomes more reticulated, it can be made effective only by creating numerous penalties for non-compliance with it. It is regrettably easy for the executive officer to devise a complicated administrative scheme and to lend a sanction to each portion of it by adding a penalty of summary jurisdiction. The number of such minor penalties in every modern State is huge: we seem to be getting back to the medieval conditions in which a man could scarcely stir hand or foot without incurring some trivial amercement payable to the King:[1] and this swarm of stinging insects does not diminish when we remember that a large number of local authorities school our conduct with abundant "by-laws for good order and behaviour." However, I do not wish to exaggerate this aspect of social discipline; it is still possible for a careful man to exist for considerable periods together without paying fines or going to prison.

During the formative period when the common-law principles of our criminal jurisprudence were being built up—*i.e.* before the field became so copiously covered by statute—the "public" aspect of crime was constantly insisted upon. Again and again in eighteenth-century cases judges, and especially Lord Mansfield, emphasized it. Perhaps the most characteristic distinction between public and private wrong is that drawn by Lord Mansfield in

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[1] *P. & M.*, ii, p. 513.

R. v. *Wheatly,* (1761) 2 Burr. at p. 1127 (an indictment for selling to the prosecutor short measure of beer) :

> The offence that is indictable must be such a one as affects the public. As if a man uses false weights and measures, and sells by them to all or to many of his customers, or uses them in the general course of his dealing : so, if a man defrauds another with false tokens. For these are deceptions that common care and prudence are not sufficient to guard against. So, if there be a conspiracy to cheat : for ordinary care and caution is no guard against this. Those cases are much more than mere private injuries : they are public offences.

In 1789, in *Young* v. *R.*, 3 T.R. at p. 104, Buller J. adopts this statement as expressing the typical distinction between tort, or breach of contract, and crime. A few years later, in *R.* v. *Higgins,* (1801) 2 East at p. 21, Lawrence J. says : "All offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable." And as late as 1854, Pollock C. B. observes in *Jefferys* v. *Boosey,* 4 H.L.C. at p. 936 (but the observation is very much *obiter*) : "I think the Common Law is quite competent to pronounce anything to be illegal which is manifestly against the public good." Upon this broad and vague principle, a number of acts which, it was strenuously contended, were not offences known to English law, were held to be indictable : *e.g.* not brewing beer, with the intent and effect of diminishing the public revenue ;[1] giving a bribe in order to procure a public office ;[2] supplying to prisoners of war food unfit for human consumption ;[3] supplying unwholesome bread to a military asylum ;[4] raising the price of the public funds by false reports of the death of Napoleon and rumours of an early peace.[5]

Discussing[6] these and similar cases, Stephen is strongly of opinion that they belong to a phase of development now definitely past, and that the function, necessary in its own day, which they performed has now been supplanted by statute. But the old doctrine has not entirely disappeared. It seems to be still a principle of our criminal law that an act calculated to produce "public mischief" is, though not specifically declared to be so by any statute, *prima facie* an indictable offence.[7] So much, however, of the

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R. v. *Starling,* (1663) 1 Lev. 125.

[2] *R.* v. *Vaughan,* (1769) 4 Burr. 2494, a case much discussed and relied upon in *R.* v. *Whitaker,* [1914] 3 K.B. 1283.

[3] *Treeve's Case,* (1796) 2 East P.C. 821. Cf. 4 Bl. *Comm.* 161.

[4] *R.* v. *Dixon,* (1814) 3 M. & S. 11.

[5] *R.* v. *De Berenger,* (1814) 3 M. & S. 67.

[6] 3 *H.C.L.*, p. 357 f.

[7] See *Russell on Crimes* (8th ed.), pp. 10 and 1400 ff. ; Stephen, *Digest* (7th ed.), Art. 230 ; Archbold, *Criminal Pleading* (27th ed.), p. 1317.

principle as still survives has been almost entirely absorbed by the law of criminal conspiracy. Most of the early cases above-mentioned possess a strong element, express or implied, of conspiracy; and even the modern law of conspiracy retains an extraordinarily wide and undefined element of the suppression of "public mischief." It is well known that the agreement of two or more persons may be a criminal conspiracy although the end which it has in view is *per se* neither a crime nor a tort, but merely an act gravely prejudicial to the public interest.[1] It is true that when questions of "public mischief" arise nowadays, they will nearly always be covered either by statute or by the extremely elastic law of conspiracy; but even in our own times the courts sometimes have to pay attention to the old doctrine, as will be realized by reference to such cases as *R.* v. *Porter*, [1910] 1 K.B. 369, and *R.* v. *Brailsford*, [1905] 2 K.B. 730.[2] It is even said by some writers that the publication of false news to the public detriment (which is a delict by French law if committed *mala fide* to the disturbance of public order) is an indictable offence;[3] and it is very possible that the question may some day come before the courts for decision.

(*a*) Classifications of Crimes.—The "public" aspect of crime becomes apparent when we attempt to classify criminal offences into interrelated groups.

The schemes which have been proposed for the classification of crime are innumerable and extraordinarily divergent. No good purpose would be served here by attempting to collate those which have been suggested by various jurists of eminence. One of the best known is that propounded by Bentham in *Morals and Legislation*:[4] it is adopted and expanded by Austin[5] in several of those tables or conspectuses which were so dear to his heart. Bentham had a genius for classification, and for inventing terminology to fit it; but no part of *Morals and Legislation*, or indeed of any of his principal writings, is less satisfactory than his classification of crimes. It is arbitrary in the extreme, and seems to rest on no consistent principle. It is astonishing, for example, to find him setting apart a whole separate group of what he calls "semi-public offences," which are so described because they do not injure the whole of society, but only a neighbourhood or class, "through calamity." On the same topographical principle, one might classify crimes as North of England offences and South of England offences, or we might classify crimes to property as those which affect owners of money, owners of silver, owners of jewellery, and so forth—in fact, there is no limit whatever to classifications of this kind. When he comes to a group of offences which will not adapt themselves to any of his groups or classes, Bentham escapes the difficulty, as he too often did, by bundling them together with a polysyllabic word: they become instantly "multiform" or "heterogeneous" offences. Unfortunately for such summary methods, there is, as I shall presently mention, scarcely a crime which is not "multiform" or "heterogeneous."

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[1] See Kenny, *Criminal Law*, ch. xviii; *R.* v. *De Berenger*, *ubi sup.*; *Vertue* v. *Lord Clive*, (1779) 4 Burr. 2473.

[2] In 1930 a stipendiary magistrate had to consider whether any offence had been committed by a woman who falsely informed the police that she had "kidnapped" a child, whereas she had in fact returned it to its mother: see *The Law Journal*, September 20, 1930, p. 170. The learned magistrate, however, was able to convict the woman of another offence, and was dispensed from the necessity of settling the hitherto undecided question whether hoaxing the police is an act involving "public mischief."

[3] See *Odgers on Libel* (5th ed.), p. 459; *Russell on Crimes* (8th ed.), p. 1405.

[4] Ch. xvi. Cf. "Theory of Legislation," Part I of *Principles of the Penal Code*.

[5] *Lects.*, pp. 1101–5.

It is not surprising that there should be this embarrassing diversity in the suggested classifications of crimes, for, plainly, everything depends upon the consideration which is chosen as the basis of grouping. Crimes may, for example, be classed according to the motive which prompts them—thus we may speak of crimes of anger, crimes of jealousy, crimes of lust, crimes of cupidity, and so forth. Or they may be classed according to the object against which the offence is committed—as crimes to property and crimes to the person. Other possible principles of arrangement are the kind of punishment or the kind of procedure applicable; the degree of moral wrongfulness; the gain which the offender has in view—money, personal condition, benefit to self or family, and so forth; or the element in public or private life which is injured by the criminal act—the security of the State, the safety of the person, the institution of property, of marriage, etc. I agree with Dr. Charles Mercier[1] in thinking that this last is "the most secure basis for a natural and scientific arrangement of offences," for it keeps most clearly before us the social repercussions of criminal acts, and therefore, by inference, the reasons which lead the State to treat such acts as requiring penal repression.

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[1] In *Crime and Insanity*, Home University Library (Messrs. Thornton Butterworth). This little book, written by a medical expert, contains a far more clear and scientific discussion of the classification of crimes than any technical legal work known to me. The author, however, falls into error in stating, at p. 156, that false imprisonment is not a crime in English law. It is a misdemeanour at Common Law.

(*b*) "Multiformity" of Crimes.—But neither this nor any other system of classification will be wholly without its chinks and fissures. For it is clear that many crimes have several different social effects, according to the point of view from which we consider their immediate and their ultimate consequences. Thus all offences to person and property do immediate harm to the person or thing attacked, but they also have the secondary consequence of creating general public alarm. Suicide may be variously regarded as an "offence against self" (though, *me judice*, there is no such thing in law), or injury to public sensibilities, or an injury to racial integrity. The offence which is "not to be named among Christians" may be considered as an injury to racial integrity; but in the old law it was classed with heresy as an "offence against God," its origin, very probably, being traceable back to an Hebraic interdiction which, though clothed with religious sanction, was really inspired by the struggle in Asia Minor for tribal survival. Rape, again, is not only harmful to racial integrity, but is an aggravated assault and battery to the person. The offence of smuggling, to take a "public" crime at random, may be regarded either as a breach of the peace or as an injury to the public revenue. The crime of sending an unseaworthy ship to sea may be viewed either as a wrong affecting a limited class of persons "by calamity," as Bentham would say, or as a threat to public safety in general. Wherever we turn, we shall find these possible differences of points of view; but some concessions must be made to any scheme of classification, and we can keep only one principal object in view at a time. That object, as here pursued, is very much the same as that laid down long ago in *Heydon's Case*, (1584) 3 Rep. 7a, for the interpretation of statutes—namely, to discover "the mischief and defect" in contemplation, and "what remedy the Parliament [or the Common Law] hath resolved and appointed to cure the disease of the commonwealth."

(*c*) "Public" and "Private" Crimes.—From the earliest times a distinction has been drawn between "private" and "public" offences: and I do not know of any reputable scheme of classification which does not contain it in some shape or other. The reason is manifest. Let it be granted that all crimes, and indeed all wrongs, react to the public disadvantage: yet it is plain that there are some offences which *primarily* injure specific persons or their rights and *secondarily* injure the public interest, while there are others which *directly* injure the public interest, represented by various factors of social organization, and do not injure specific individuals at all, except in the very remote and indeterminable sense that ultimately every individual is a joint beneficiary in the public advantage.

In modern States, public crimes considerably outnumber private crimes. This fact may be illustrated by an analysis of English criminal law at the present time. I have made an attempt to assemble all indictable offences known to English law and to classify them according to two main divisions: first, into "public" and "private," in the sense which has been already explained; and second, into the different aspects of private existence and social co-existence which they seem primarily to affect.

Considerations of space prevent the printing of this analysis in full, but its principal results may be briefly summarized. There are 331 indictable offences known to English law, and they may be classified as follows:

I. PRIVATE OFFENCES.

1.	Wrong to the Person	33
2.	Wrongs to Family Relationships	2
3.	Wrongs to Property[1]	93
		128

II. PUBLIC OFFENCES.

	Acts injurious to:	
1.	Constitutional Government	14
2.	International Relations	6
3.	Defence Services and National Security	8
4.	Racial Integrity (Sexual Morality, Decency, Marriage, Self-preservation)[2]	31

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[1] A large number of these consist of acts which are very similar to each other in nature and effect, though technically distinguished by various statutes as separate indictable offences.

[2] Sexual offences, though technically known as "offences to the person," are repressed primarily because of their detrimental effect upon race. On no other ground, for example, is it possible to explain the prohibition of unnatural offences and of incest. It is difficult to draw the line between the public aspect of sexual offences and their violation of a fundamental right of personality; and while the public or social element predominates, in some cases, such as rape and indecent assault, it has seemed to me that the more serious aspect is the attack upon a right of personality, and I have therefore classified them as private offences. On the other hand, a crime like carnally knowing a young girl is not necessarily an offence "of aggression," since the consent of the female is no defence; it is repressed because of its detrimental effect upon race. Public indecency, again, is in a sense an injury to public comfort, since it offends susceptibilities, but the susceptibilities which it offends are, in the last analysis, instincts of racial integrity. As for suicide (by which, of course, we mean attempted suicide), the desirability of treating it as a crime is highly questionable; but since it *is* a crime by English law, it can be accounted for only on one of three grounds: (*a*) as an offence against Divine law (see 4 Bl. *Comm.* 189; but apparently it was never a purely ecclesiastical offence; (*b*) as causing public alarm or horror; (*c*) as being injurious to race-survival. The first reason would hardly now be maintained as a legal principle. As to the second and third, it is difficult to say which is uppermost in the public mind. One suspects

5.	Revenue and Public Property	28
6.	Religion and Public Worship	8
7.	Public Peace	14
8.	Industry	6
9.	Administration of Justice	23
10.	Public Administration	26
11.	Public Health	2
12.	Public Safety, Comfort and Convenience	17
13.	Shipping	11
14.	Thrift[1]	3
15.	Honours and Dignities	1
16.	Humanitarian Instincts	5
		203

(*d*) The Public Aspect of Crime predominates.—The public aspect of crime has continuously grown and in modern societies is the dominant characteristic of criminal law. Private wrongs demand private restitution—that is a principle of corrective justice; but many, indeed most, private wrongs, and in addition a large number of disobediences which are not private wrongs at all, also demand public repression in the collective interest. There we may leave the matter, with this further observation only. It is pertinent to bear in mind the preponderance of public over private crimes when we are told, as we are constantly told, that all legal duties are relative to rights. It would seem, on the contrary, that our criminal law swarms with duties which are not correlated to legal rights, but are "absolute" duties, in Austin's sense, imposed by the organized power of the State in the general interests of society. That view I have urged elsewhere; and in some sort the present discussion has been intended to fortify, by further examination of the criminal law, the contentions there advanced.

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that the average man feels that an example should be made (if at all) of the *felo de se* because he has behaved in a shocking manner which is painful to others. But the waste of life is also an important consideration: thus Blackstone, *loc. cit.*, having emphasized the element of *sin*, observes that suicide is also a crime against the King, "who hath an interest in the preservation of all his subjects." In early times he had a very practical interest in the preservation of the accused person whose property was about to be forfeited on conviction, and special rules therefore were necessary to ensure forfeiture of the suicide's land or goods; but this prosaic aspect of the matter had apparently been forgotten before the time of Staundeford—see Stephen, *H.C.L.*, iii, p. 105. The whole subject of "racial" offences is fruitfully discussed by Dr. Charles Mercier, *op. cit.*

[1] The three offences classified under this head are street betting (third offence), inciting infants to bet or to borrow money, and offences by moneylenders (Moneylenders Act, 1927, ss. 5 and 16). With regard to the first two, the ethics of gambling are so controversial that different reasons may be given for the legal prohibition of certain forms of gaming and wagering; but the basic reason seems to be economic —*i.e.* the injury to the economic foundation of wealth caused by the attempt to acquire, without labour or production, the fruits of labour and production.

THE IMPERIAL CONFERENCE OF 1930.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

Dominion Criticism of the Conference of 1929.—It is not surprising that in the Dominions the Report of the Conference of 1929[1] on the operation of Dominion Legislation and Merchant Shipping Legislation, while welcomed by exponents of the doctrine of autonomy, should have raised grave doubts among the statesmen with experience of constitutional issues. The Conference of 1929, perhaps inevitably, departed essentially from the results of the Conference of 1926. Lord Balfour's declaration of Dominion status was meant, as he made it clear at Edinburgh, to assert equality of status but diversity of function, but in its application the Conference of 1929 wholly discarded the latter principle and in lieu adopted the doctrine of equality pure and simple. It is not surprising that the present Prime Minister in Canada, a lawyer of distinction, deprecated the proposal pressed on the House of Commons by the Liberal government to approve simpliciter the Report, and suggested the fullest consideration and reference to the provinces. Mr. Latham, Leader of the Opposition in the Commonwealth, who has contributed a valuable study of the question[2] was equally emphatic; Australia, he insisted, would have been content to leave the matter alone with a possibility of clarification of some points as to merchant shipping and the Colonial Laws Validity Act. The Report was the work of lawyers, but statesmanship was far more important; rigidity was to be avoided, and it was better not to express in legal shape all the political results of the Conference. Mr. Coates, Leader of the Opposition in New Zealand, was equally emphatic, and the Prime Minister agreed with him in holding that New Zealand had had no grievance and would have preferred to leave matters alone, while in the Council on August 21, 1930, Sir John Sinclair and Sir James Allen insisted on the necessity of safeguarding Imperial unity. Mr. Hughes, in the Commonwealth, was equally emphatic in repudiating the idea that the formal definition of Dominion equality in legislation was desirable. The Imperial Parliament, he pointed out, was sovereign and could in theory repeal the Commonwealth Constitution, but in fact it could not so act, and the Commonwealth might equally well admit that it also was bound by certain restrictions, which were an inevitable part of Imperial unity. These views are, of course, dictated by the acceptance as fundamental of the aspect of unity side by side with autonomy, and it is significant that the Report has been received with most favour in the Irish Free State and the Union of South Africa, in which Dominions alone is there any substantial movement in favour of secession.

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[1] *Journal of Comparative Legislation*, Third Series, vol. xii, pt. iv, pp. 278–86.

[2] *Australia and the British Commonwealth* (1929).

Effects of Dominion Criticism.—The result of these doubts has been to bring about very substantial modifications [1] of the Report of 1929. The right of the provinces of the Dominion to be consulted, and the necessity of their acquiescence before the Colonial Laws Validity Act is tampered with in its application to Canada, were readily conceded, and the sections of the proposed Statute of Westminster which deal with that Act will not be made applicable to Canada unless on the form of request which is deemed at present proper for the alteration by the Imperial Parliament of the British North America Act, nor will they be liable to be applied later to the Dominion save on such a request. This concession meets the demands of the provinces of Ontario and Quebec among others, whose governments protested strongly against any idea of permitting the federal Parliament to depart from the constitution of 1867 which is in the nature of a treaty, and which can be altered only with the assent of the provinces, or at least of the majority thereof, including Ontario and Quebec. In the case of New Zealand the dislike of any rash action is evinced by the definitive provision that none of the provisions of the Statute shall apply to New Zealand unless adopted by the Parliament thereof. It must be added that this mode of procedure, which was also suggested by Mr. Crouch for Australia, appears to be desirable in every case. As it is, the procedure contemplated is merely that both houses of the Dominion Parliaments should pass resolutions before July 1931 with a view to the Statute being passed to take effect from December 1, 1931, but considerations of equality would seem to demand that the Statute should be dependent for its effect on adoption by the Parliaments of the Dominions, and it is rather curious that, though for a different reason, New Zealand alone should have adopted this attitude.

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[1] *Parl. Paper*, Cmd. 3717.

Imperial Legislation for the Dominions.—The Statute as finally approved will provide that "No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend to a Dominion as part of the law in force in that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof." Legally, of course, the clause is nugatory, for the Imperial Parliament, being sovereign,[1] cannot bind itself, and there is a certain objection to any attempt to accomplish the impossible, but the rule laid down has long been a maxim of constitutional law, and it must be remembered that the Irish Free State constitution has already set the model of abstract declarations of principle. Moreover, the clause has been improved since the Report of 1929 by the insertion of the words "as part of the law in force in that Dominion," which is intended to negative the possibility of it being held that the Imperial Parliament could not legislate with extraterritorial effect in regard to matters taking place in a Dominion to the same extent as it can legislate regarding matters taking place in foreign countries. The insertion of the words raised apprehensions in the minds of some Dominion spokesmen lest the Imperial Parliament might claim greater rights of legislation under these words than international comity permits, but an assurance was given that this was not intended. As the question of the bounds set to such legislation by international comity is wholly unsettled, as the learning collected in connexion with the *Lotus* case[2] shows, the limitation remains wholly vague, but notoriously the Imperial Parliament is far from willing to exercise its authority beyond local limits.

The Colonial Laws Validity Act.—The Statute will provide as follows: "(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion. (2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation, in so far as the same is part of the law of the Dominion." But the effect of this clause is suspended as above mentioned in the case of Canada, and it is expressly provided that "Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia, or the Constitution Act of the Dominion of New Zealand, otherwise than in accordance with the law existing before the commencement of this Act," and for greater security it is added that "Nothing in this Act shall be deemed to authorize the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia." These provisions are sufficient to safeguard the rights of the Australian States, and they leave to the Imperial Parliament alone power to amend the Commonwealth of Australia Constitution Act, 1900, as opposed to the Constitution itself, which probably involves the result that the Commonwealth Constitution cannot cease to be federal without the direct interposition of Imperial legislation. The saving of the position of the Constitution Acts (rather than Act) of New Zealand is perhaps superfluous, for the power of change at present possessed by the Parliament is a matter of dispute,[1] and the opportunity might well have been taken to clear up the issue and to give the Dominion the same full power of change which is enjoyed by the Union of South Africa or still more fully by Newfoundland.

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[1] A. V. Dicey, *Law of the Constitution* (ed. 8), pp. 62 ff.

[2] *Publications*, Series A, no. 10; *British Year Book of International Law*, vi, pp. 44-60; viii, pp. 108–28; Wheaton, *International Law* (ed. Keith), i, pp. 272–4.

The Position of Merchant Shipping.—In addition to the power to repeal Imperial legislation as to merchant shipping, the powers of the Dominion Parliaments are extended by exempting Bills from the necessity of reservation when dealing with the coasting trade under s. 736 of the Merchant Shipping Act, 1894, and of confirmation by the Crown under s. 735 when dealing with registered shipping. The concession here is one of real importance, for it tacitly sweeps away the agreed settlement of the Colonial Navigation Conference of 1907, which confined the operation of Dominion legislation to shipping registered in the Dominions and to the coasting trade. An effort is made by an agreement, which is to take effect from the date of the grant of freedom to legislate, to secure that there shall be uniformity in matters essential, but it is idle to imagine that the agreement can have that effect. It is merely proposed by the agreement that the governments of the Empire, including that of

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[1] Keith, *Responsible Government in the Dominions* (1928), i, pp. 354, 355.

India, should introduce legislation to give it effect, and its terms will be fully satisfied if this is done. The Parliaments will be free to do as they think fit, as is the case with conventions accepted by governments under the Labour sections of the treaties of peace. In the case of Australia, even under the terms of the agreement, it is perfectly clear from the history of merchant shipping legislation that the Parliament will use its power to enforce on any British ships trading with the Commonwealth Australian ideals of manning, accommodation, conditions of service, and pay, as well as other matters. It will be open to that Parliament to exclude British Indians from employment on any ship trading with the Commonwealth, and the same right, of course, belongs to New Zealand and the other Dominions. Moreover, in these matters, though equality of treatment at least with foreign ships is enjoined by Part IV of the agreement, it is perfectly obvious that it cannot be enforced. Australia is too dependent on openings for her export trade to face foreign reprisals, her sensitiveness to which has been strikingly shown in the earnest efforts made by the Prime Minister to conciliate Belgium in respect of the recent tariff legislation excluding the importation of certain classes of goods. It is further clear that the agreement promises to produce chaos as regards regulation of matters of discipline and punishment of offences committed on board ship, while the Conference itself recognized that it failed to make proper provision for the control of ships registered in a part of the Empire to which they do not regularly trade. It is much to be regretted that the Conference did not adopt the practical doctrine of according to each part of the Empire the sole right, subject to any international treaty accepted by it, to regulate all matters affecting ships registered therein and its coasting trade. Provision should have been made for the enforcement in any part of the Empire[1] of the laws affecting vessels registered in any part, and for the control of vessels, whose owners are established in a part of the Empire other than that in which their ships are registered, by the laws of the former territory. This plan of complete equality between all the parts of the Empire would have been the fullest recognition of Dominion status, and would have involved no derogation from their sovereignty, for as the Permanent Court of International Justice[2] has said, " Restrictions on the exercise of sovereign rights accepted by treaty by the state concerned cannot be considered as an infringement of sovereignty." It is unfortunate that the British shipping industry has failed to impress these considerations on the Conference, for the inevitable outcome of the new conditions will be the addition of considerable burdens to shipowners, which will be passed on to consumers and producers in the United Kingdom and the Dominions alike, and the grant to foreign shipping of considerable advantages over British shipping. It may be noted also that the Conference has by Article 12 (2) of the agreement given approval to the policy, adopted in another form in the Indian Bill to reserve the Coasting Trade, of the grant of preference for local shipping by admitting the right of each part of the Empire to give financial assistance to ships registered in that part. It is, however, satisfactory to note that the Conference clearly realized the complexity of the position, and no doubt in due course common sense will secure the adoption of effective working principles, however unfortunate it may be that for a time confusion is inevitable.

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[1] Including courts in protected territories and naval courts; Keith, *The Sovereignty of the British Dominions*, pp. 234, 239.

[2] *European Commission of the Danube Case, Publications*, Series B, no. 14, p. 36.

Extraterritorial Legislation.—The Statute will provide that " It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extraterritorial operation." This provision is unquestionably open to serious objection. It goes far beyond what was asked for by the Parliament of the Dominion of Canada in 1924 after the fullest consideration of the position ; it goes far beyond what was agreed to by the Imperial Conference of 1926, and its terms have been criticized effectively by experts such as Mr. Bennett and Mr. Cahan, K.C., in Canada, and Mr. Latham. The plenitude of authority given will enable the Irish Free State and the Union of South Africa, should they think fit, to impose serious disabilities on British subjects in Northern Ireland and Southern Rhodesia, and the power might be used to force acceptance by these territories of inclusion with their neighbours, while their lack of corresponding power would render them unable to retaliate. There can be no real doubt that the power should have been restricted as proposed by the Imperial Conference of 1926 or in some other way, and it is unsatisfactory that no attempt has been made to explain the reason of the deviation from the original proposals, while the government of Northern Ireland has shown curious indifference to the interests of its citizens in this regard. The consciousness of the dangerous character of the rule has, fortunately, led in the agreement as to shipping to the adoption of the principle that the several parts of the Empire shall not apply their legislation as to merchant shipping with extraterritorial effect to ships registered in another part, save in matters affecting the coasting trade or the fishing industry of the part in question. This provision is, at the same time, most significant as showing the extremely wide scope of the right to legislate now conceded, for *prima facie* no Dominion has the slightest right to regulate extraterritorially ships not registered therein. Moreover, in this point again the disadvantage to British shipping is apparent, for any Dominion attempt to regulate foreign shipping in such a way would lead to reprisals of an effective kind.

Admiralty Jurisdiction.—Provision will be made to free Dominion legislation as to Admiralty jurisdiction from any fetter as to reservation imposed by the Colonial Courts of Admiralty Act, 1890. The Privy Council [1] had already suggested that the Dominions had full power of legislation, and the removal of any restriction is obviously proper. It is, of course, desirable that there should be as much uniformity as possible as regards the exercise of such jurisdiction, but this is a matter on which there is no special reason to insist.

Reservation and Disallowance of Bills.—The Conference has naturally approved the recommendations in the Report of 1929, and unfortunately has failed to deal with one issue there left in a most unsatisfactory state. The right to disallow legislation infringing a loan contract, on the faith of which Dominion securities have been admitted to trustee status in the United Kingdom, is to be retained, despite the grave derogation thus involved to Dominion sovereignty, for, if it is true, as Mr. Bennett has insisted, that Canada cannot be treated as equal with the United Kingdom since the latter must alter her constitution, it is equally clear that no Dominion can be equal with the United Kingdom if the latter can disallow any law. Moreover, the safeguard is a most unhappy one under modern conditions. It would be most invidious to endeavour to make it effective, and it would have been far more useful for investors to provide definitely an arbitral tribunal to decide on any dispute arising and to pledge the Dominions to give full effect to its findings. In any case it is inevitable—as New Zealand frankly recognizes—that the new status should tend to increase the cost to the Dominions of their loans from the United Kingdom. The assertion of equality, with the corresponding right to repudiate debts, will, therefore, inure to the benefit of the United Kingdom by increasing the demand for its securities, a fact recently illustrated by the regrettable decline in the position of Australian securities on the British market. It may, therefore, be hoped that matters may be placed by agreement on a secure footing for the Dominions, which will enable British investors to renew their old faith in the security of their investments.

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[1] Keith, *The Sovereignty of the British Dominions* (1929), pp. 240, 241.

An Inter-Imperial Tribunal.—The omission of any provision for arbitration is the more remarkable because the question of an Inter-Imperial or Commonwealth Tribunal was debated by the Conference, with rather curious results. The extended powers of the Dominions will almost inevitably give rise to issues between the United Kingdom and the Dominions, or the Dominions *inter se*, which cannot be settled by mere negotiation and which would justly be referred to an Inter-Imperial Court. All the parts of the Empire have accepted definitely the obligation to refer to the Permanent Court justiciable disputes between them and foreign countries, but it proved impossible to obtain agreement to this effect as regards inter-imperial disagreements. The result is almost incredible, so destructive is it of the doctrine of the confidence which parts of one Commonwealth ought to feel in the good faith of one another, but the excuse must be that the Irish Free State declined to accept the doctrine that inter-imperial disputes are not proper subjects for the Permanent Court, and by rendering the inter-imperial system facultative sought to discredit it. Unhappily so far, in every case where the treaty of 1921 has been found to operate to the disadvantage of the Free State, the British government has made sacrifices to meet its demands for change, a process which has naturally disinclined the Free State to risk the necessity of honouring an arbitral award. The net result, therefore, is merely the quite negligible approval of voluntary submission of disputes between governments when justiciable to arbitration, and the suggestion that the tribunal in such cases should be made up of five members, none foreigners, two selected by each party, one of whom must not be chosen from its own territory, and the fifth by those nominated by the parties. The agreement fails to specify whether it accepts the doctrine of the Permanent Court[1] that a dispute becomes one between governments whenever a government chooses to take up the cause of a national, and it leaves it wholly vague which of the various attempts[2] to define "justiciable" it adopts. For all practical purposes the Conference has failed to deal with the issue, for it has always been open for any two parts of the Empire to settle disputes *inter se* by reference to an agreed tribunal and to abide by the result, as in the case of the dispute between Newfoundland and Canada over Labrador.[1]

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[1] *Mavromattis Case, Publications*, Series A, no. 2, p. 11.

[2] Cf. *British Year Book of International Law*, xi, pp. 70, 71; vi, pp. 82–8.

The Appeal to the Privy Council.—On this subject there was a complete failure to achieve any result, and this is the more important because the necessity of admitting appeals to an external authority is naturally regarded by advocates of autonomy as a grave derogation from national status. But the difficulties of progress were enormous, for, so long as an appeal lies from Canadian courts, it is arguable that an appeal under the treaty must lie from Irish Free State courts, and, on the other hand, the Irish Free State, though it inserted the right of appeal in its constitution at the demand of the British government, based on the treaty, is determined not to honour the obligation. In these circumstances the obvious solution was for the Free State to accept the compulsory jurisdiction of an Inter-Imperial Tribunal in return for the removal from the statute book of the right to appeal to the Privy Council.[2] The matter, however, has been complicated by the protests of the minority in the Free State against the abolition of a safeguard for the due performance of the treaty, especially as regards the safeguarding of religious interests other than those of the Roman Catholic Church whose influence over the Free State has been greatly increased by the establishment of formal diplomatic relations between the Pope and the Free State. It is clearly an invidious position [3] for the Free State to refuse to agree that any dispute on this head is a proper issue for an Inter-Imperial Tribunal, and the British government after all owes a debt of honour to the minority in the Free State, whose interests it was forced by considerations of expediency to sacrifice in 1921. It may, however, be hoped that in course of time the Free State may realize the necessity of accommodation and of maintaining a reputation for good faith in inter-imperial no less than in international relations. In the case of Canada it is clear that it is extremely difficult to expect Quebec to sacrifice the present assurance of an impartial arbitrament on issues affecting her vested interests, and it is equally clear that the Dominion government and the British government cannot move in this matter without the approval of Quebec.

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[1] *In re Labrador Boundary*, 43 T.L.R. 289.

[2] This would secure that the laws of the Free State would not be open to challenge save on the considered demand of the British Government.

[3] Cf. Darrell Figgis, *The Irish Constitution*, pp. 56, 57.

The Appointment of the Governors-General.—Canadian opinion has emphatically disclaimed any interest in this issue, which has been forced by the desire of the Commonwealth to secure the appointment as Governor-General of a former collaborator with the Labour party who has attained to high judicial office, but whose views have not therefore changed in character. Put briefly, the issue raised was whether the Governor-General is to be treated as an ordinary official of the Commonwealth, whose appointment, though in the name of the Crown, is decided upon by the government of the day, or whether the selection should be made after consultation between the Commonwealth and British governments and the King. As the Governor-General now represents the King only, the Conference reached the decision that in making the appointment the King must act on the advice of the ministry[1] in the Dominion, and that " the channel of communication between His Majesty and the government of any Dominion is a matter solely concerning His Majesty and such government. His Majesty's government in the United Kingdom have expressed their willingness to continue to act in relation to any of His Majesty's governments in any manner which that government may desire." The principle enunciated is conceivably more important than the actual subject-matter concerned, and it is most unfortunate that no hint is given whether the Conference desired to lay it down in general or merely in respect of the question dealt with. It must, however, be deduced from the procedure adopted, by which the principle is inserted merely as part of the definition of the position of the Governor-General, that, as usual, the issue of the general principle has been evaded. It must, however, be pointed out that there is a distinct difference between the position of a Governor-General even under the new procedure and that of an ordinary officer of the Commonwealth government. The fact that the King is to be consulted informally in the first instance assures that His Majesty is enabled to veto an unsuitable appointment, and in deciding what appointment is suitable he will have the great advantage of informal advice from his British Prime Minister if he so desires. Inevitably His Majesty cannot be adequately informed personally of local conditions and must be guided largely by a ministry's desires, but a ministry must for its part refrain from suggesting any person who by partiality or personal character would be an unworthy representative of the Crown. Though the Irish Free State has virtually selected its own Governors-General, it has been careful to make a wise selection, and, with equal restraint on the part of the Commonwealth, the result might have been unobjectionable. But it is impossible to resist the justice of the Canadian view that the existing system was completely satisfactory and that the selection of a person not resident in the Dominion had great advantage in securing freedom from that implication in local issues which necessarily affects the public belief in the impartiality of any local selection for the post of representative of the Crown. There are also serious objections to the selection of a judge for the office, and it is clear that a new government can, if it likes, demand his removal in favour of its own nominee. But a vital feature of the British system is the position of the Crown as impartial custodian of the constitution.

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[1] The commission of the Governor-General was countersigned by the Secretary of State who controls the Signet, and he thus technically is responsible. This is necessary under the Letters Patent of 1900, and the Conference did not agree to alter such instruments. If not so made, the appointment would doubtless be invalid, as Sir E. Mitchell argued.

Foreign Affairs.—The discussions on foreign relations apparently yielded nothing of constitutional importance. It would have been most important if the doctrine as to the channel of communication as applied to the selection of the Governor-General had been made applicable to the conduct of foreign relations, but this was doubtless felt impossible, for the simple reason that the Conference had to reiterate the doctrines (1) of mutual consultation before treaties are negotiated, (2) of reasonable celerity in communicating observations on the part of governments receiving information, and (3) of the impossibility of any government imposing obligations on another without its assent. It pointed out very properly that the establishment of Dominion legations was a fruitful means of exchange of views between the local representatives of the Crown abroad. This necessity of intercommunication renders it essential that, if any information on foreign issues is sent to His Majesty, it must be communicated to the British government at the same time, and inevitably His Majesty cannot desire, or be expected, to deal in isolation with any of his governments. To put the issue concretely, even if the King were to issue full powers and instruments of ratification on the formal advice of a Dominion minister only, without the present intervention of a sign-manual warrant countersigned by the Secretary of State, he would none the less feel bound to discuss the action taken with his Prime Minister or a Secretary of State, either directly or through his Private Secretary. Moreover, it is clear that the Great Seal of the Realm cannot constitutionally or legally under the Great Seal Act, 1884, be used without the authority of an Imperial minister, and, if his intervention is not desired, it would be necessary to use the Dominion seal. The alternative procedure [1] of giving to the Governor-General a delegation of the treaty power, and the prerogative of declaring war and making peace, has clearly not found favour, as tending too obviously to the destruction of Imperial unity. It is, however, clear that it might thus be found possible to solve the problem of equality; the degree of inter-imperial co-operation could then be defined by agreement, which could deal with the issue of neutrality and the question how far the Dominions are ready to assume the burdens of national status.

British Diplomatists and Dominion Governments.—As the Dominions for reasons of economy still desire to make use of the services of British representatives abroad, it has been decided to facilitate such action by distinguishing between classes of matters according as there is or is not to be normally interposed, before action is taken on a Dominion request sent direct, consultation between the British representative and the Foreign Office. In the latter category fall such obviously uncontroversial matters as complimentary messages, invitations to non-political conferences, and requests for information of a technical or scientific character. Much more dubious is the category of the negotiation of commercial arrangements affecting exclusively a Dominion government and a foreign power. It is perfectly obvious that the whole point is the question what matters exclusively affect a Dominion government. A proposal which, for instance, would injuriously affect British trade could not be acted upon automatically by any British representative abroad.

Defence.—It was distinctly disappointing that the Conference, immersed in minor questions, failed to deal seriously with defence issues. The obligation of apportioning the respective shares of naval defence under the restrictions of the London treaty was apparently not faced, and the British government accepted, under pressure from Australia and New Zealand, a limited liability for proceeding with the projected naval base at Singapore. It is, however, clear that the development of autonomy must carry with it the undertaking by the Dominions of responsibility for their own defence, and that the doctrine of equality demands some slight progress towards effacing the gulf between British expenditure on this score and that of the Dominions. The position of Canada, as stressed by Dr. Riddell, its representative at Geneva, in the discussions of November 8, 1930, on disarmament, is rendered possible only by the protection afforded to the Dominion by the United States under the Monroe doctrine, and the Dominions in the Pacific cannot rely for security either on that doctrine, or on the League Covenant or the Paris Pact, without running grave risks. Pressure of economic difficulties has induced both Australia and New Zealand to curtail defence expenditure and thus further to accentuate their dependence on the British taxpayer, but no doubt the inconsistency of this position will be gradually recognized both in the United Kingdom and the Dominions, and the latter will cease to demand from the former undue sacrifices on their account. Formerly, indeed, the Dominion preferences represented a very real acknowledgment of British aid, but the doctrine adopted at the Conference that these preferences must rest on a mere business footing of reciprocal advantage has placed in a new light the issue of British expenditure, in so far as it is enhanced by the acceptance by the Admiralty of the duty of defending the Dominions.

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[1] Keith, *The Sovereignty of the British Dominions* (1929). p. xviii.

The Control of Armed Forces and Prize Law.—On these issues the Conference marks no progress. It is, however, obvious that the question of legal control of troops must be seriously dealt with in connexion with the new status of the Dominions, but the only matter directly affecting the United Kingdom is that of its control over its forces while on Dominion territory, and save as regards the Irish Free State that issue is not now pressing. The same remark applies to the question of prize law.

Nationality.—The Conference on this topic registered no advance. It was merely agreed as usual that each part of the Empire must decide its own rules; that as far as possible they should aim at keeping up the idea of a common status which could be recognized throughout the Empire; but that deviations from this position must be admitted. Nothing is said as to the vexed question of the nationality of married women beyond the record that agreement was impossible further than is provided in the Nationality Convention of The Hague Conference, 1930, under which a married woman's loss of nationality on marriage, or during marriage by change of her husband's nationality, shall be dependent on her acquiring his nationality, and that when a husband is naturalized, the wife shall not change her nationality save with her consent. Any further legislation must be on an individual basis, and no Imperial agreement will secure recognition of a wider rule. The issues are too difficult to regard the result as unsatisfactory; the insoluble problem of private international law, due to the discrepancy of the Anglo-American and the continental doctrines of the basis of status, is deeply complicated when in the same family there are differences of nationality, and the position of the children of spouses of different nationality is incapable of satisfactory solution.

The Status of High Commissioners.—No serious change was attempted in regard to the High Commissioners, though a further step in precedence was accorded by obtaining the King's approval that they should rank after Secretaries of State, save when a Dominion minister is present, when the High Commissioner of that Dominion ranks immediately after him. The suggestion that diplomatic immunity from suit might be accorded is not adopted, and, so long as High Commissioners are concerned with business transactions, it is plain that it could not properly be granted, as far as matters arising from such business are concerned, though in other aspects the precedent followed in the Soviet representative's case might be applied.[1]

Arbitration and Disarmament.—On these topics the Dominion governments were naturally guided by the British government's views, and gave general adherence to the idea of the acceptance of the General Act for the Pacific Settlement of International Disputes, subject to the making of reserves[2] similar to those made when the Optional Clause of the Statute of the Permanent Court was accepted. The government of the Union deferred approval of this proposal for further consideration of the Act, and no light is shown on the grounds which have instigated the attitude of the Dominions to a rather unsatisfactory instrument.[3] Naturally also the Dominions adopted the British view of the disarmament question, exhibiting apparently none of that desire to lead Empire opinion desired by Mr. Hughes. The truth is that in all the Dominions without exception serious appreciation of these issues is confined to a small section of public opinion, and effective discussion by the press or otherwise of such issues is in its infancy. No doubt, however, this lack of appreciation is already on the way to being remedied.

The Right of Secession.—On one topic the Conference preserves in its report complete silence—General Hertzog's pledge to his Parliament to return with the imprimatur of the Conference for the right of secession as implicit in Dominion status, a doctrine which has figured largely in Indian views as to the significance of the promise by the British government of Dominion status as the final outcome of Indian constitutional evolution. It was indeed impossible for the Conference to homologate this doctrine ; the discussions in the Parliaments prior to the Conference, whether in Canada, the Commonwealth or New Zealand, negatived any idea of their representatives being able to accept General Hertzog's thesis. Moreover, it was rendered wholly inadmissible by its lack of definition of conditions. Obviously there could only be agreement on the right to secede if it were precisely defined in what conditions it were permissible, and this would involve provision for the expression of the desire by an effective majority of the subjects of the King in the territory [1] concerned, and for the giving of due notice, so that British and Dominion arrangements for defence would not rudely be defeated by a sudden secession with the result of forbidding the use of Dominion territory as a source of supplies or a basis of operations. Instead the Conference agreed to recommend the insertion in the Statute of Westminster of a preamble to the effect that " it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the succession to the throne, or the royal style and titles, shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom." The preamble of course has no legal force at all, and its insertion merely serves, as General Smuts insists, not so much to magnify the power of the Dominions, but to deny any of them the right of secession without the assent of all the other Parliaments of the Empire. It is possible to sympathize with General Hertzog's dissatisfaction with this outcome, but after all what else was possible ? His majority in his own Parliament is small, and it was obtained at a time when he had disclaimed the idea of secession, and the British and other Dominion governments could not accept a doctrine which must apply equally to the Irish Free State and to India.

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[1] See Art. 2 of the Commercial Agreement of April 16, 1930 (Cmd. 3552).

[2] Cf. *British Year Book of International Law*, xi, pp. 63–84.

[3] *Ibid.*, xi, pp. 119–33.

The Position of Newfoundland.—The report leaves undefined the position of Newfoundland, but the Conference of 1929 did not include a representative of Newfoundland and there is no explicit indication that it is intended that the definition of Dominion then drawn up is to be extended to include that territory.[1] Newfoundland, of course, took full part in the proceedings of the Conference of 1930, and her status as a Dominion remains unaffected by the fact that for certain purposes she does not apparently desire to claim the same position as the greater territories, from which she differs already by not enjoying the right of distinct membership of the League of Nations. It remains naturally possible that ultimately this right may be desired and conceded.

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[1] Natal could claim the right to secede from the Union on its secession from the Empire.

The Practical Effect of the Conference.—The result of the Conference, to put it briefly, is not, as suggested by some foreign critics, to surrender the paramount power of the Imperial Parliament, which is impossible in law, but to define the measure of its future exercise by an Act which itself illustrates its paramount authority. The practical extension also granted of Dominion authority rests in the field of extraterritorial legislation and merchant shipping; the authority conceded in these respects is imperfectly guarded and will afford ground for inter-imperial disputes, and unluckily provision for a tribunal to deal with such issues is left facultative. Fortunately the reserve powers of the Imperial Parliament can be adduced, with Dominion assent, to undo any ill results. The chief defect of the new decisions is the addition of a serious element of rigidity[2] in the Imperial system, which will affect to a negligible extent the United Kingdom, but may complicate matters especially as regards the interpretation of the federal constitutions, while adding to the profitable labours of Dominion lawyers. The net result may, therefore, prove to be to some extent a disappointment to the Dominions, but the Imperial Parliament will doubtless be glad to carry the project into effect in the hope that Dominion aspirations will be gratified. If, finally, the question is asked why the British tradition of reliance on constitutional conventions in lieu of statute law has been abandoned, it may safely be suggested that the answer is to be found that in 1929 and 1930 the driving power in the direction of change came from distinguished representatives of the French, Dutch and Irish races, to whose minds the apparent incoherence of Anglo-Saxon views of constitutional issues had no sufficient appeal.

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[1] Newfoundland and India are included as parties to the Merchant Shipping Agreement, which is, of course, based on the assumption of the concession of full legislative authority. India doubtless will be dealt with in the new Government of India Act. But the Report fails to deal with the case of Newfoundland, possibly by a mere oversight.

[2] See Lord Hailsham and Lord Buckmaster, *House of Lords Debates*, lxxix, pp. 380 f., 388 f., and Lord Sankey's significant admissions, *ibid.*, p. 386. It is significant that Lord Passfield was unable to cite any Imperial Act actually injuring the Dominions subsequent to 1865, *ibid.*, pp. 409 f.

Constitutional Aspects of Economic Issues.—From the proceedings of the Conference in its economic aspect it transpired that it might ultimately be felt desirable to arrange for preferential treatment of inter-imperial trade on an agreed basis, whether the form of preference adopted was by way of tariffs or quotas or otherwise. It is clear that in any such agreement it will be necessary to make provision for some simple method of deciding disputes such as may arise under any agreement, and for its determination at comparatively brief notice; any other procedure would involve grave risks of inter-imperial friction most dangerous to the maintenance of political unity. The desire of the British government to assimilate its position in minor matters to that of the Dominions was seen in its decision that its representation on the Imperial Economic Committee should be on the same basis as that of the rest of the Empire, and in the agreement that the Chairman should be elected annually by the Committee, regard being had to the desirability of rotation. In connexion with the Empire Marketing Board a slight point of some importance was raised by the Union of South Africa, which dissented from the resolution that the Board should be constituted with a fixed minimum annual income with power to receive contributions from public or private sources for furthering marketing of Empire products. The Union held that the fund was and should remain solely the concern of the government of the United Kingdom, and doubtless this objection was constitutionally sound, for otherwise the Union would have put itself in the position of urging in effect on the British Parliament the duty of providing for the marketing of Empire products. No doubt the other Dominions considered that the invidiousness of urging expenditure was removed by the fact that the scope of the fund is to be extended, with the concurrence even of the Union, to marketing products outside as well as in the United Kingdom. This step is a proper recognition of the right of the British taxpayer to have British products advertised in the Dominions in addition to paying for advertising Dominion products in the United Kingdom. The discussions on immigration were productive of the definitive enunciation of the doctrine that the criterion must be the absorptive capacity of the Dominions alone, negating finally any suggestion that the Dominions are under any moral obligation to aid in the problem of the redistribution of population in the Empire.

THE BUDDHIST LAW OF SUCCESSION IN BURMA.

[*Contributed by* A. E. RIGG, ESQ., *Ex-Puisne Judge of the Chief Court, Lower Burma.*]

A SCOFFER once asked whether any good thing could come out of Nazareth and was invited to come and see. It may be a matter for surprise to those unacquainted with the subject that there is administered in Burma a system of law relating to succession, inheritance and marriage, which is not only well suited to the temper and needs of the Burmese people, but is founded on admirable principles of equity and justice. I have been asked to write a note on the sources of that law and on the main features of its operation in questions of succession. By s. 13 (1) of the Burma Laws Act (xiii of 1898) it is enacted that such questions are to be governed by the Buddhist law where the parties are Buddhists, except so far as such law has been altered by enactment or is opposed to custom having the force of law. In determining what is the Buddhist law on any given point, the courts rely on pronouncements from the Dhammathats where these are not opposed to custom and do not outrage equity and good conscience. In s. 2 of the Kinwun Mingyi's Digest a Dhammathat is defined as "a collection of rules which are in accordance with custom and usage and are referred to in the settlement of disputes relating to person and property." There are thirty-six Dhammathats, of which eleven are in verse, twelve in prose and thirteen in Pali. Dr. Forchhammer showed that the origin of the law contained in the Dhammathats is not from an indigenous source but is of Hindu derivation, modified from time to time to suit the requirements of the Burman tribes which adopted the religion of Gaudama. In some respects, as *e.g.* the position of the wife in the family and the constitution of the joint family, the modification has been very far-reaching. Caste has no place in Buddhist law, and the Burmese woman is as free legally and socially as any woman in the world. So profoundly has Burmese law diverged from Hindu law, that there is no real analogy between them. These Dhammathats were drawn up at various dates between A.D. 727 and A.D. 1845 and some of them received the royal sanction. The rules given in these codes for the division of family property are abstruse and difficult and vary to a considerable extent, and sometimes are not consistent even in the same Dhammathat. From time to time alternative methods of division are stated without any recommendation about the better course.

These variations are in keeping with the character and genius of the Burman, who prefers settlement by compromise to a hard-and-fast decision based on logical deductions from legal premises. (It is remarkable that there are no references in the judgments of British courts to decisions of the Burmese Hlut Daw or High Court.) Now, however, it is settled law[1] that where the Manugyè Dhammathat lays down a clear rule on any point in dispute, its authority is to be treated as paramount to that of all or any of the other Dhammathats. This Dhammathat was compiled in the reign of Alompra and was issued by royal authority in A.D. 1756. But even the authority of the Manugyè must give way when it conflicts with custom having the force of law. It is the body of customs observed by Burmese Buddhists to which the courts have to give force and the Dhammathats are only important in so far as they give information about such customs. In *Ma E Mya* v. *Ma Kun*[2] Mr. Burgess remarked on the small regard paid to technical rules of the Dhammathats and the tendency in favour of equal division of inheritance, and a similar view was taken in Lower Burma.[3] It is obvious that the test of immemorial antiquity cannot be applied to customs having the force of law in Burma. The Privy Council have laid down that the legal recognition of custom in British India depends on its antiquity, certainty and uniformity,[4] and in another case[5] held that evidence of an unbroken custom for eighty years was sufficient. The Rangoon High Court said the courts could not extend their inquiries beyond the time of their establishment,[6] which in Burma would be about 1862. Where there is neither written law nor custom to guide the courts, they decide in accordance with justice, equity and good conscience.

Kinds of Property Comprised in the Estate of a Married Couple.—Before dealing with the rules governing succession to estates, it is necessary for me briefly to explain the different kinds of property which may be comprised in the estate of a Burmese married couple. Property brought to the marriage by either spouse is called *păyin* when the parties have not been married before, and *atetpa* when they have been previously married. *Lettetpwa* property is that which has been acquired or inherited after marriage and includes the profits derived from *păyin* or *atetpa*. *Hnăbăzôn* is the term applied to property acquired by the husband and wife by their skill and industry during their marriage, or to the profits from the employment of *atetpa* or *păyin*. *Kanwin* is property given at the time of marriage by the parents or bridegroom and is regarded as *hnăbăzôn*. Property solely belonging to one of the married couple is called *thinthi* and includes *păyin*, inherited and self-acquired properties. On the dissolution of marriage by divorce or death, these different kinds of property may be treated or devolve in different ways according to the circumstances of the case. *Păyin* or *atetpa* property may change its character during the marriage, by becoming so merged in the joint property that it is no longer possible to identify it. Mere change of the corpus of the property, however, does not change its character. Different treatment is also made to some extent in calculating the shares of different classes of children. The natural children may be distinguished as either *orasa* and *kanitta*, or may all stand on an equal footing. An *orasa* child is one who on account of his or her position in the family is vested with a definite share in the parental estate, which share he or she can claim on the death of the parent of the corresponding sex. To qualify a child for the status of *orasa*, three conditions must be fulfilled[1]: (1) he or she must be the first-born child, (2) must attain majority, *i.e.* the age of twenty, (3) must help either in the acquisition of the family property or if a daughter must assist the mother in the care and control of the household. Where a son is incompetent to assume the duties of his father, the next brother can step into his shoes. It is doubtful whether a daughter younger than a son can ever take the place of the eldest-born daughter who is not competent or dies before she is able to take her mother's place. The reason given in the Dhammathats (see s. 62 of the Digest) for preferential treatment of an *orasa* child is that a child that helps the parents is entitled to a larger share in the estate. That share is a quarter of the estate as it existed at the time of the parent's death. The *orasa* is not bound to take his share qua *orasa* and may prefer to be treated as an ordinary child. The High Court has recently decided that if he has taken his share, he is not entitled to further participation in the estate. The adoption of children is not infrequent in Burma, and the two common forms are *keittima* and *apatittha*. The *keittima* child is adopted with a view to becoming an heir in the family of his adoption. So long as the adoption continues, he is excluded from any share in the estate of his natural parents. He may sever the adoption when he reaches years of maturity or it may be cancelled by the natural parents so long as he is still a minor. But although a *keittima* child is regarded practically as if he were a natural child, he suffers from two disabilities: (*a*) he can never become an *orasa* and (*b*) he does not get the full share of a natural child in property that was not yet in the possession of his adoptive parents during their lifetime, but only a half share. The co-heirs get the other half share. An *apatittha* child is one adopted without any intention that he should inherit. If there are natural or *keittima* children, he is altogether excluded: if there are no natural descendants and he lives with the adoptive parents, he gets a half share with the other co-heirs.

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[1] See *Ma Hnin Bwin* v. *U Shwe Gon*, P.C., L.B.R. 8, p. 10.

[2] 2 U.B.R. 1892–6, p. 102.

[3] *Ma Kyi Kyi* v. *Ma Thein*, 3 L.B.R., p. 8.

[4] 14 Moore I.A., 570.

[5] 27 I.A. 328.

[6] Rangoon, vi, p. 639.

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[1] See *Kirkwood alias Ma Thein* v. *Ma Sin*, 2 Rangoon P.C., pp. 774 seq.

With the exceptions mentioned above all legitimate children have an equal share in the parental estate, where there is not competition between the children of more than one marriage. Polygamy is legal in Burma, but is now regarded with disfavour, and if the chief wife does not consent to a second wife being taken in wedlock, she can insist on a divorce. The effect of marriage on property was considered recently by a Full Bench of the High Court,[1] and in a decision differing from all other decisions of the last forty years it was declared that on marriage, in all the property *păyin*, *lettetpwa* or *hnăbăzôn* a Burman Buddhist and his wife are partners: that this partnership is dissolved only at death or by divorce and neither party is entitled to any share of the partnership property until such dissolution takes place. If one of the married couple inherits property after marriage, the other spouse has a vested third interest in it. On divorce, it may be a question of importance whether property is *păyin*, *lettetpwa* or *hnăbăzôn*, but as regards the devolution of a Burman Buddhist's estate, the estate is treated as a single unit. I think that the general rules applicable to the succession of such an estate may be briefly stated as follows:

(1) Husband and wife, where there are no children, succeed to the whole estate of the deceased spouse, including an accrued right to share in the undivided ancestral property. The survivor

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[1] See *Ma Paing* v. *Mg Shwe Paw*, Rangoon 5, p. 296.

can enforce partition of such property and obtain the deceased's share. If he does this, his natural heirs alone succeed to such property. But if he fails to enforce partition, his heirs may do so on his death, but in that case they will only obtain two-thirds the share of the first deceased, whose natural heirs succeed to the remainder.[1]

(2) Where there are children the surviving spouse, subject to any claim by the *orasa* or by the eldest daughter to certain specified property, has an absolute right of disposal over the whole of the joint property of himself or herself and the other spouse. Joint property here includes *atetpa* or *păyin*, and *kanwin* or *lettetpwa* property of the deceased.[2] But if the surviving spouse remarries, the children can sue for partition. The eldest child is entitled to one-fourth if he or she has not taken it as *orasa*, and the other children to one-fourth. It has also been decided that a *keittima* child can exercise the same rights as an own child in the event of a second marriage. In this way the children of the first marriage are protected from possible devastation of the estate caused by new influences brought to bear on their parent or by complications arising out of the formation of a second family.

(3) On the death of both parents, the children share equally, if the *orasa* (if any) has taken his or her share.

Inheritance does not Ascend if it can possibly Descend.—It is a fundamental principle of Burmese Buddhist law that inheritance shall not ascend if it can possibly descend. In the absence therefore of blood, *keittima* or *apatittha* children, stepchildren succeed to their stepparents' property, except undivided ancestral property. If there is not a stepchild, illegitimate children or even illegitimate stepchildren may inherit the estate. But such children are not allowed to share with the widow in the father's estate. Where there is no widow nor legitimate child, an illegitimate child, who lived with the father may inherit the whole estate, but if he lived with other relatives, he and the other relatives take a half share each. The devolution of property is likened by some of the composers of the Dhammathats to the course of a stream to the sea—the flow must be forward not backward. But if there are no surviving husband, wife nor lineal descendant, the property ascends first, as water from the sea may ascend a stream. In *Mg Po Hmon* v. *Mg Kan*[3]

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[1] *Mg Waik* v. *Mg Nyein*, 2 U.B.R. 97–01, p. 146.

[2] *Ma Sein Ton* v. *Ma Son*, L.B.R. 8, p. 501.

[3] U.B.R. 97–01, p. 157.

Thirkell White said that failing such lineal descendants the parents are entitled to succeed in preference to all other relations. This case was apparently not brought to the notice of their Lordships of the Privy Council when *Ma Hnin Bwin* v. *U Shwe Gon*[1] was decided, but it would probably not have influenced the decision had it been cited. In this case it was ruled that *in families which have ceased to live together*, preference is to be given to brothers and sisters, and failing them, the estate goes to the parents. But the High Court has decided that the exclusion of parents by brothers and sisters when the family have ceased to live together must be treated as an exception to the rules regarding nearness of relationship. In a very recent case[2] a bench held that where a Burman Buddhist had died whilst still a minor and living with his mother and sister, the mother is not debarred from inheriting the property by the fact that the sister is alive. They said that the rights of the mother stood on a different footing from such rights had the propositus attained his majority and separated himself from the parental roof. It is clear that a mother stands in relationship to her son nearer than does her daughter by the same father. Failing parents and brothers and sisters, the property passes to grandparents (if any).

If there are no parents or grandparents, nephews and nieces succeed in preference to uncles and aunts, and the children of nephews and nieces to cousins. This rule follows from the further principle that inheritance shall not ascend more than is necessary. To reach the nephew it is not necessary to ascend at all, whereas to reach the uncle it must ascend once.

We have seen that a husband is heir to his wife in respect of their joint property. But a case may arise in which the wife predeceases her parents. If she dies childless, her husband has no claim to any of the property of her parents, but if she has children, those children are entitled to a share in the parents' estate to the exclusion of their father. The survivor of a married couple has no claim to succeed to a mere right of inheritance on the part of the deceased spouse in the parental estate. Another curious point arises as to the right of succession to the estates of married couples dying childless within a very short period of one another. According to c. 32, book 10 Manugyè, the parents of the respective spouses take back the property brought by their child to the marriage and divide the jointly acquired property equally. *In re Ma Myin, Ma Hnyin*

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[1] L.B.R. 8, p. 1.

[2] *Ma On Myaing* v. *Ma Me San*, Rangoon 7, p. 75.

and Mg Tin Maung[1] this short period was fixed at one month, in the absence of any special circumstances for extending that period, so that there should be no undue interference with the ordinary rules of succession. If one of the married couple brought no property to the marriage, that brought by the other is to be divided into three shares of which his parents will get two.

Rule of Exclusion.—The general rule of exclusion regulating succession to a Burman Buddhist's estate is that the nearer relative excludes the more remote. Equidistant collaterals of the same level share equally, but those of a lower level exclude those of a higher one.[2] But to this rule there are exceptions, the most noteworthy of which is the case of grandchildren. There are two kinds of grandchildren known to Burmese Buddhist law: (1) "in time grandchildren" and (2) "out of time grandchildren." The former are those whose parents died after the death of their grandparents and the latter are grandchildren by a predeceased child. As Burmese writers say, these have not reached the inheritance. Now the ordinary rule is that in a case where all the parents have predeceased the grandparents, the grandchildren succeed *per capita* and not *per stirpes*.[3] In a contest between a grandchild or grandchildren whose parents have predeceased the grandparents, and their uncles and aunts, the ordinary rule of exclusion is not applied. If the eldest son or daughter, being an *orasa*, predeceases the parents, his or her eldest child is entitled to an equal share with the youngest brother or sister of the deceased. Otherwise grandchildren receive only one-fourth of the share of an uncle or aunt. In *Ma Thaw* v. *Ma Sein*[4] Moore J. said: "The usual, I think the universal, rule of Buddhist law as regards heirs more than one degree remote is that they succeed by right of representation. Grandchildren share *per stirpes* and not *per capita*. They are regarded as representing their parents."

But in *Mg Shwe Ye* v. *Mg Po Mya and others*[5] Carr J. said that representation was not a principle of Buddhist law and that the partial representation allowed to grandchildren in competition with children is merely an exception to the general rule and is the only exception. In Ma Nan Shwe's case[6] it was held that in a competition between children of one marriage and grandchildren by another spouse (their parents having predeceased the common ancestor) the rule of division is the same as that obtaining between the children of different marriages. A grandchild, however, cannot sue his grandparent for a share in the estate when there are uncles and aunts, if the grandparent remarries. Grandchildren are therefore in an inferior position both in respect of the shares to which they can make claim and the power of enforcing partition in the case of the grandparent's remarriage, to that of children.

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[1] L.B.R. 10, p. 288.

[2] *Ma Ma Gale* v. *Ma Me*, 2 U.B.R. 04–06 Inheritance, p. 5, and *Lahiri Buddhist Law*, p. 134.

[3] *Po Thu Daw* v. *Mg Po Than*, 1 Rangoon 331.

[4] 5 L.B.R., p. 91.

[5] Rangoon 3, p. 464.

[6] *Ma Nan Shwe* v. *Ma Sein*, Rangoon 2, p. 514.

The only reason given in the Dhammathats for not allowing a grandchild the full share to which his father would have been entitled, had he survived, is that the grandchildren are " more remote." As in olden times the grandchildren in many cases lived in close association with, if not together with, the grandparents, reluctance would naturally be felt by the family in excluding them altogether from inheritance. The tendency in Burmese Buddhist law seems to be to pay more attention to the family than to the individual member of it, and so long as the family subsists, those who are members of it are entitled to a share in the partition on its dissolution. It is probably rather due to a feeling of the hardship that would be inflicted on grandchildren by complete exclusion, that they have been allowed some share in the ancestral estate, than to any idea that they represent their parents. In all the most recent decisions, the High Court seems to have taken the view that heirs inherit in their own right and not through derived rights. In an early case [1] it had been decided that a deceased person's nephews and nieces in inheriting his estate take *per stirpes* and not *per capita*. But this case is no longer good law. In *Mg Ba Gon* v. *Ma Pwa Thit* [2] the High Court said that heirs, all of whom are related in the same degree to the propositus, share equally in their own right and not by representation. *Per contra*, where they are not related in the same degree, they are excluded by relations of a nearer degree, and there seems to me to be no room for any principle of representation in such a scheme of inheritance.

In a separated family, the deceased's younger brothers and sisters exclude his elder brothers and sisters, but the second child of an elder brother or sister would not exclude one older than himself or herself. The Dhammathats say nothing about the exclusion of half blood relations by full blood and at first the view taken in Burma was that full blood relations superseded the half blood ones.

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[1] *Mg Kyaw* v. *Ma Tu*, U.B.R. 2, 1892–6, p. 189.

[2] Rangoon 5, p. 747.

But this is no longer the law. They only exclude them when both stand in the same degree of propinquity to the propositus, and this holds good even in the case of steprelations. Thus a stepbrother excludes his maternal aunt, and stepchildren exclude his brothers and sisters.

Children may not only be disinherited by the operation of adoption into another family, but for reasons of misconduct. A son who behaves in an unnatural or unfilial fashion towards his parents is called a dog son and forfeits his right to inherit. But a single act of mere disobedience, however glaring, is not sufficient cause for exclusion, unless the act is one of positive enmity. There must be persistent disregard of parental authority and an irreconcilable breach between parents and child with clear manifestation of an intention on the parents' part to disinherit.[1] Children may also lose their right to inherit when a divorce takes place between the parents. Parties in Burma generally make their own arrangements regarding the custody of the children. Where the divorce is by mutual consent the husband is entitled to the custody of the sons and the wife to that of the daughters. But the Dhammathats do not provide for cases in which the divorce is adjudged for the fault of one party. A guilty spouse has to leave the house and may have to forfeit all claim to the animate and inanimate property.

It seems just that the custody of the children in this case should be given to the innocent party, with such right of access as the court may think fit to allow. There is great weight of authority for the proposition that the child of a divorced couple can only inherit from the parents with whom he or she lives[2] and is not entitled to inherit from the other parent (when that parent has remarried and there are children of the second marriage) property acquired during that marriage. It is the will of the natural parents that determines the devolution of the estate. If, however, there is a continuance or resumption of filial relations between the parent and child, the child may inherit. By the term filial relations is meant something more[3] than paying visits to the parent, or receiving presents from him which would only indicate the continuance of those relations that are natural between parent and child. "Filial relation" implies living and working and planning with the parent. *Mi Nyo* v. *Mi Nyein Tha*[1] was a case in which a daughter of a divorced wife lived with her mother and did not maintain filial relations with her father. The daughter was born after the divorce and the father left no other wife or descendant. There was a sister living with the father, however, and it was held that the daughter and sister took a half share between them of the father's estate. This ruling is based on ss. 279–99 of vol. i Kinwun Mingyi's *Digest* and is in accordance with the Burmese desire to have an heir in descent, which desire in other cases leads to an illegitimate child being allowed to inherit.

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[1] See *Lahiri*, 2nd ed., p. 191.

[2] *San Mra Rhi* v. *Mi Thai Da U*, 1 L.B.R. 167 ; *Ma Paw* v. *Ma Mon*, 4 L.B.R. 274 ; *Ma Yi* v. *Ma Gale*, 6 L.B.R. 169.

[3] *Ma Tok* v. *Ma Chit*, U.B.R. 3, p. 23.

Wills and Gifts.—There is no such thing as a will in Burmese Buddhist law. In 1917 the question of the advisability of granting Burmans the power to will away their property, either wholly or in part, was discussed at great length. I am glad to say that the agitation to obtain this power did not result in any steps being taken to confer it. The absence of such a power was supposed to affect big businesses in the hands of Burmans, on the ground that on the death of the owner, or if there was more than one owner, of one of the joint owners, the heirs might insist on a division and in order to effect this it might be necessary to sell the business as a going concern. But there are very few big businesses managed by Burmans, and it is not clear that there are not other and better ways of overcoming the problem than by introducing the power to make wills into a system of inheritance where there is no place for such a power. Sometimes a dying person will call his heirs together, and get them to agree to the share each is to take after his death. The courts have held that such an arrangement agreed to by the heirs is valid and binding on them. When reduced to writing, it is known as a *thedanza*, which is incorrectly translated in Stevenson's Dictionary as "testament or will." But Burmans sometimes seek to alter the ordinary succession of property by gifts. At the time of the *shinbyu* ceremony (when a son enters the monastery as a novice) parents may make a contingent gift by declaration publicly and such a gift is valid between donor and donee. The property remains at the disposal of the parents during their lifetime, and if the donee dies the gift has no effect. Grandparents may likewise make contingent gifts to their grandchildren. But whilst the Dhammathats recognize the power of parents to make gifts, the compilers clearly saw that such a power must be confined within proper limits. Manuvannana says, "if a considerable quantity is given to any child, the value of such property is to be set off against the share of such child as the gift is not equitable." In s. 75, vol. i of the Kinwun Mingyi's *Digest*, the gift of the entire estate by the parents to one child is declared void. The Manugyè lays down that if the child is one who is of great assistance to the parents he shall get double his ordinary share, and this authority limits the maximum amount of a gift to this double share. There are no decisions about the exact extent of their estate which the courts would permit parents to give to any particular child: this would probably depend on the circumstances of each case; but the courts would certainly interfere with a gift that had the effect of disinheriting to any considerable extent the other children. To use the simile adopted in the Dhammathats, no hen (with any regard to equity) could allow one alone of her brood to have all the grain. The other requirement necessary for the validity of a gift, viz. delivery of possession, is no longer needed in those parts of Burma where the Transfer of Property Act (IV of 1882) is in force. In *U Po U* v. *Ma Tok Gyi*[1] the contest was between a chief wife, her husband and a lesser wife for the cancellation of deeds of gift by the husband to the lesser wife. These deeds gave her lands forming part of the joint property of the marriage and the chief wife had not consented to the gift. It was held that such gifts were void on the ground that they are contrary to a basic principle of Buddhist law, viz. that the property of a married Burmese Buddhist couple is impartible, except on death or divorce. It follows from this decision that a husband cannot give part of the joint estate to a child without his wife's consent.

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[1] U.B.R., Inheritance, 1904–6, p. 15.

Partition.—I now come to the question of partition between the wives of a husband who has married more than once, and between them and the husband. There is no authority in the Dhammathats for a solution of this point, which has therefore to be treated[2] in accordance with general principles of equity and good conscience and such analogies in Burmese Buddhist law as may seem helpful. The general principle laid down in the Manugyè is that in property inherited by the husband from his parents, after his marriage, he gets double the share of his wife. But the Rangoon High Court has applied this principle differently in two recent decisions.[3] In the former case it was held that the husband gets double the share of each wife, whereas in the latter case (a Full Bench decision) the husband's share was declared to be double that of the wives collectively, who were said to have a vested interest in one-sixth of the property from the date at which it was inherited. In Po Nyun's case the court laid down the interests of husband and wives as follows: (*a*) in property brought by the husband to the first marriage: husband two shares and the first wife one. The second wife takes one-third of two-thirds, equals two-ninths. The husband therefore gets four-ninths; (*b*) in property jointly acquired during the first coverture: first wife gets half.

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[1] See *Lahiri*, 2nd ed., p. 153.

[2] See *Lahiri*, 2nd ed., p. 153.

[3] *Po Nyun* v. *Ma Saw Tin*, 3 Rangoon 160; *C. T. P. V Chetty* v. *Mg Tha Hlaing*, 3 Rangoon 322 (F.B.).

In the *atetpa* the husband gets two shares and the wife one; the second wife therefore gets one-third of half, equals one-sixth.

It seems unnecessary to work out in detail the various shares in the *păyin*, *atetpa* and *lettetpwa* of the two marriages, as the division proceeds on the principle illustrated above.

Wives who live in separate houses from that of the wife with whom the husband takes his meals are not entitled to inherit. Wives who inherit his property equally are now called "superior" wives, whilst "inferior" wives if living with the husband are entitled to a two-fifths share as against the three-fifths share of the superior wife. Co-widows take their own *păyin*, their *kanwin* and their inherited property on partition.

The next case for discussion is partition between the children of a parent who has married more than one spouse. The rule is thus laid down in *Ngu Lu Daw* v. *Mi Mo Yi and I*[1]: "The rule appears to be that the child who claims through both parents gets a double portion of inherited and other *lettetpwa* property. The Dhamma lays down that where three wives were married in succession the hereditary property of the father is to be divided into three shares. The son of the first wife is to receive two shares and the two sons of the second and third wife the remaining share between them. This text obviously refers to the case where the property has been inherited during the first marriage. But the compiler of the Dhamma has made a mistake which is pointed out by the compiler of the Manugyè. In the case of two marriages only, the son of the marriage during which the property was acquired would get two-thirds. In applying this rule to the case of three marriages, the compiler of the Dhamma still gives the son of the marriage during which the property was acquired a two-thirds share. Manugyè says this is wrong. "As the three sons are of the same father, though by different mothers, the whole of the father's hereditary property shall be divided into four shares. The son of the first wife shall receive two shares and the son of the second and third, one each."

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[1] U.B.R., 1914–16, p. 66.

The same rule will apply if the father comes into possession of hereditary property while living with the second or third wife. A son is given two shares out of the property acquired during his mother's lifetime because he has the right to inherit through both parents."

In *Ma Khin* v. *Ma Kin Kin* [1] it was held that where a Burman had had more wives than one, property inherited by one of the wives during marriage, if still in existence at the time of the death of husband and wife, descends to the children by that wife: the children by other wives have no share in it. This case was quoted in *Ma Pan and Others* v. *Ngwe Sa and Another* [2] and was stated to apply to cases where a Burman Buddhist had more than one wife at the same time. But where he married his wives on the death or divorce of a former wife, the ordinary rule of partition between children of different marriages applies. If a man or woman marries three successive spouses and has children by each marriage, the *atet* children (*i.e.* the children of a former marriage) each get their once-married parents' *atetpa* property. As regards the *lettetpwa,* the children of the marriage during which the property is acquired take double the share taken by the children of the other marriages. In the case of inherited property the same rule prevails. On partition, the division between children of different marriages is always *per stirpes.*

Stepchildren may Inherit.—It has already been pointed out that stepchildren are entitled to inherit. On the death of their own parents they can demand partition with the stepparent. The division between them is *per stirpes.* If there is no issue of the subsequent marriage, stepchildren take three-fourths of their parents' *atetpa* property, but if there is issue they take only five-eighths. If there are children by more than one previous marriage, the three-fourths share must be divided according to the rules applicable to division between half brothers and sisters. In all property inherited after marriage the stepchildren and parents get a half share each. With reference to the *hnăbăzôn* property, if there are children by the second marriage, the stepchildren take one-eighth and the stepparent the rest. If there are no children, stepchildren get one-sixth.

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[1] U.B.R., vol. iv, p. 11.

[2] Rangoon 7, p. 526.

LIABILITY IN DAMAGES UNDER FRENCH ADMINISTRATIVE LAW—III.

[*Contributed by* PROFESSOR LOUIS TROTABAS, *Nancy*.][1]

Objective Responsibility.—The Theory of "Risk."—Objective responsibility makes its appearance as complementary to responsibility for fault which still remains as the primary source of administrative responsibility. The new theory supplies the inadequacies of subjective responsibility in certain cases where equity requires the reparation of damages caused without fault by the public services to private persons. In addition to the merits of this practical result, objective responsibility has also a theoretical advantage over subjective responsibility which in view of the conception entertained at present of the French system of administration was bound to ensure its success. A finding of fault, in effect, presupposes a control, a strict examination of the activity of the author of the damage which leads to pronouncing against him a judgment that he has done an act worthy of blame of which the damages are to be the sanction. Now, the separation drawn between administrative authorities and judicial authorities and the resulting prohibition of any encroachment upon the administration by a judicial authority, whether that authority be an administrative court or a court of common law, makes it a delicate matter for the judge to inquire into alleged faults of administration. Despite the elasticity of administrative jurisprudence and its harmonious development, the liability which is based upon the investigation of an alleged fault and the finding that it exists is of necessity limited in its scope. Objective responsibility, on the other hand, leaves full liberty to the court and at the same time respects the principles of the separation of authorities because it does not necessitate any invasion of the *penetralia* of the administration. It is sufficient for the court to find that as a result of an administrative activity a concrete fact has occurred without expressing any judgment as to this fact in itself. The judge may even proclaim the merits of the administrative activity and instead of attaching to it the blame implied in a finding of fault—always a delicate thing to do in dealing with administration—he may, on the contrary, praise highly the manner in which the administration behaved. All the same, if, as a consequence of this perfectly proper action, damage was caused to an individual, the material fact of this damage will, on the theory of objective responsibility, be enough to involve reparation by the administration, irreproachable as may have been its conduct. This theory of objective responsibility, respecting, as it does, the separation between administrative and judicial authorities and reconciling on the one hand the independence and the privileges of the public services, and on the other hand the moral and equitable principles which protect the individual citizen, is a theory which commends itself and was bound to have a large development in administrative law.[1] If, however, objective responsibility strikes one as particularly well adapted to the requirements of administrative law, it must at the same time be observed that it is far from easy to formulate a juridical basis for it.

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[1] Translated by the Editor.

In regard to subjective responsibility, as we have seen earlier, though the administrative courts had no precise text of the law upon which to rest their judgment, they had at any rate the analogy of the general rules of civil responsibility for fault which were laid down in Art. 1382 of the Civil Code. But as to objective responsibility, even this analogy was wanting: in private law objective responsibility is admitted only by way of exception. It is noticeable that the *Conseil d'Etat*, in its decisions, has always expressed itself in an extremely guarded manner. As a rule it refrains from laying down any ground in law for its judgment but confines itself to affirming the existence of a fact which renders the State liable in damages—*de nature à engager la responsabilité de l'Etat.* It is the legal writers who have attacked the problem of finding a legal basis for this new kind of responsibility, and various theories on the subject have been constructed. M. Hauriou, in the later editions of his work, explained these decisions by a formula taken from the civil law in the same way as in regard to subjective responsibility the general idea of fault has been taken over by the administrative courts from private law. According to him the general theory which underlies objective responsibility is enrichment without legal cause.[2]

M. Duguit, on the other hand, makes use of the idea of insurance or social solidarity.[3] It would appear, however, that the most satisfactory explanation is to be found in the idea of equality in bearing public burdens, and this is the theory adopted and expounded notably by MM. Teissier, Jèze and Duez.[4]

This last analysis rests upon one of the fundamental principles of public law which ought to ensure for all equality in regard to public services and public burdens. It is not just that a particular individual should enjoy a privileged treatment in regard to any public administration, nor, on the other hand, is it just that such an individual should suffer in a special degree by the installation or by the operation of a public service or a public work which exists for the advantage of all. If, accordingly, a government department in carrying out its administration causes special damage to an individual, this person is entitled to have the balance restored and to be placed upon the same footing as all other members of the community by being compensated for the loss which has fallen upon him specially. It is this idea of equality and equilibrium which dominates and explains all the decisions of the administrative courts which affirm objective responsibility, even although this reason is not always clearly stated, for it is evident that the *Conseil d'Etat* shrinks from committing itself to any theory on the subject, however liberal the theory may be. It is this idea which underlies the notion of " risk," a term which we have adopted as a current and shorthand expression for objective responsibility. Every public service carried on by an administration creates a risk, and it is implied in the normal functioning of the service that there shall be reparation of special damage caused to a particular individual by an activity which is for the advantage of everybody else.

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[1] See, as to the adaptation of the theory of objective responsibility to the requirements of the French administrative regime, P. Duez, *La Responsabilité de la Puissance Publique*, p. 56.

[2] *Précis de Droit Administratif*, 11th ed. 1927, pp. 335 *seq.*

[3] *Traité de Droit Constitutionnel*, 2nd ed., vol. 3, par. 81.

[4] G. Teissier, *La Responsabilité de la Puissance Publique*, 1906; G. Jèze, notes on cases in the *Revue du Droit public*; P. Duez, *La Responsabilité de la Puissance Publique.*

This complementary form of administrative liability made its appearance in France in a somewhat empirical manner as the fruit of the progressive development of the jurisprudence of the *Conseil d'Etat*. The *Conseil d'Etat*, in fact, has never laid down any clear rules as to objective responsibility capable of being applied to any hypothesis which might present itself. It seems to have reached its conclusion in a somewhat haphazard manner by picking out from among the mass of administrative activities those which ought to bear this greater degree of liability. An interesting precedent for this departure occurs about the end of the last century in the very special field of the responsibility of the State as an employer for damage suffered by its workmen. These workmen did not enjoy the benefit of pensions, these being reserved for officials, and at that period the principle was still under discussion, which was shortly thereafter embodied in the Workmen's Compensation Act, a law based precisely upon this idea of " risk." [1]

Before this law had been passed and before the courts of common law had admitted the principle of risk, the *Conseil d'Etat* did not hesitate to condemn the State to make good the loss sustained by a workman injured in a government arsenal although fault on the part of the administration had not been established.[2]

But the development of the law on this head by the administrative courts was arrested by the very fact of the new statute on workmen's compensation.

An opportunity for developing the theory very considerably came later in the more special field of damage caused by the execution of public works. Moreover, for a considerable time the theory continued to be regarded as applicable only in this special field. More recently, however, the theory has been applied outside the sphere of public works, and it now shows a tendency to penetrate into the wide field of public health and security (*police*) and even, in some cases, into the sphere of government in the narrow sense of the term, where it is impossible to admit the idea of subjective responsibility. It is this development of the law by the administrative courts which is now to be described.

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[1] *Loi du* 9 *avril* 1898.

[2] *Conseil d'Etat*, 21 *juin* 1895, *Cames*, with note by M. Hauriou, *Notes d'Arrêts* (Paris, Sirey, 1929), vol. i, p. 676.

Damage caused in the Execution of Public Works.—The necessity of making good damages resulting from the execution of public works demonstrates clearly the inadequacy of the theory of fault as the basis of administrative liability. We find ourselves here faced with a conflict between two principles equally entitled to respect. On the one side we have the administration endowed with all its privileges charged with the duty of constructing public works indispensable for public utility and of carrying on the public services. On the other side we have private property recognized by tradition as sacred and inviolable which will have, nevertheless, to suffer by the execution of these public works. In this conflict which ought to prevail? Will the owner of property be safeguarded only when he can prove fault on the part of the administration, although the mere construction of the work may in itself cause serious injury to his property?

The French legislator has provided fairly completely for the reparation of damages resulting from the actual construction of the work. When, in order to accomplish the work, the administration is obliged to make a direct invasion of the private property, this involves an occupation of it whether temporary or permanent, and the owner is entitled to an indemnity according to the rules laid down as to expropriation. With this case we are not concerned here. Our inquiry is into the principles of liability which have been laid down not by the legislature but by the courts. But, it is to be observed that the laws which, by means of the machinery of expropriation, have provided for the reparation of damage caused to individuals by the construction of public works have by no means completely settled the conflict above referred to between an activity on the part of the administration and the rights of owners of property. In reality expropriation touches only the fringe of the question. The conflict of rights becomes particularly acute after the work has been completed and when the damage complained of is not caused by its construction but by its existence. For a public work is by its nature a work executed upon a different scale from a work which would be constructed normally by a private owner of property. A private owner makes walks or drives in his garden or in his park, while a public authority makes the main high roads which intersect the country. It is frequently the case that a public work carried on upon lands belonging to the public authority causes by the mere fact of its scale inconvenience and damage to neighbouring owners. A concrete illustration of how the problem presents itself in practical life is afforded by the cases about sloping approaches (*rampes d'accès*). A house is built in the normal way with access to the public road. The administration in carrying out some important public work for the improvement of the gradients of this road may find it necessary to elevate the road at this point. The result is that a wall arises in front of the house, the ground floor becomes practically a basement and the road passes at the height of the first storey. It is obvious that the owner suffers damage, but the administration has not committed any fault ; on the contrary, by executing the work it has improved the conditions of road transport. In such a case, it is the theory of risk which solves the problem. We are in presence of damage caused to an owner of property ; the direct cause of this damage is the existence of a public work, and, therefore, the administration must pay an indemnity to make good this damage.[1]

The decisions illustrating the application of this theory in regard to public works are innumerable. During the last fifty years the series of cases on the subject dealt with by the *Conseil d'Etat* covers solutions of the most diverse questions. Only the most typical and the most celebrated can be mentioned here.

In the case of *Chamboredon* [2] the *Conseil d'Etat* awarded compensation to an owner of land whose well had dried up owing to the springs which fed it having been cut at a distance of about 200 yards from the property by the digging of a tunnel for a public work.

This decision is of special interest, not only on account of its early date, but also because it is contrary to a train of decisions in the courts of common law refusing to give damages to the owner of a well which had dried up as a result of normal operations done by a neighbouring proprietor for his own purposes, such as the sinking of a well on his land.[3] By comparing the decisions of the *Conseil d'Etat* with those of the courts of common law, we see that the administrative courts in granting compensation for damage caused by the execution of public works based their decisions on the abnormal character of these works and the fact that they were in excess of the normal risks to which neighbours are exposed. In another case damages were given to the owner of a windmill the working of which had been interfered with by the construction of a dump so large as to break the force of the wind and to alter its direction.[4]

It has also been decided that an owner is entitled to damages if his property is injured by offensive smells from the discharge of a drain.[1]

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[1] See for illustrations as to *rampes d'accès, Conseil d'Etat*, 29 *mars* 1901, *Franc*, in *Lebon, Chron.*, p. 375 ; 17 *janvier* 1902, *Commune de Chateauponsac, ibid.*, p. 28 ; 17 *juillet* 1903, *Chemin de l'Ouest, ibid.*, p. 520. The same principle applies clearly to the case where the level of a public road is lowered with the effect of leaving a building on the top of an embankment. *Conseil d'Etat*, 1er *mars* 1901, *Ville de Paris, ibid.*, p. 244 ; there is a series of cases in the same sense.

[2] *Conseil d'Etat*, 11 *mai* 1883, *Sirey*, 1885. 3. 25.

[3] As to this the English law is the same (*Mayor of Bradford* v. *Pickles*, [1895] A.C. 587 (note by translator).)

[4] *Conseil d'Etat*, 31 *janvier* 1890, *Lebon Chronologique*, 1890, p. 112.

We find also further decisions confirming the view that damages may be awarded for loss caused by the construction of public works as opposed to their existence. Thus, the keeper of a restaurant receives compensation on the ground of loss of custom caused by the blasting necessitated in the execution of a public work.[2]

Similarly, the lessee of a café or of a garage whose business is interfered with by an obstruction to the approach of the premises caused by work on the roads is entitled to compensation.[3]

And, in another case, damages were given to a cheesemonger whose premises were injured for the purposes of his business by the dust from a builder's yard occupied by a public authority.[4]

This line of decisions is extending all the time. The moment private property suffers injury from vibration, cracking, damp, smoke, etc., if the damage is caused directly by the execution or by the operation of a public work, this involves immediately, apart from all idea of fault, the liability of the public authority to make good the loss thus caused to a private individual by operations designed for the public advantage.

The administrative courts take a very broad view of the matter, and in a few cases of an exceptional character they have gone so far as to extend the remedy to injury to the person and not to property as when the public authority was found liable in damages on account of illness caused by effluvia from ground rendered marshy by the construction of a public work.[5]

To sum up under a few heads the abundant cases as to objective responsibility for damage due to public works, the following principles may be laid down:

In order to be entitled to an indemnity for damage sustained the plaintiff must show in the first place that there has been a direct and material invasion of his rights causing a depreciation of the value of his property. The rule that liability on the ground of "risk" is conditioned by material loss suffered is more absolute than when the liability is based on fault. There are, in fact, cases in which subjective responsibility has been held to exist where no damage, or, at any rate, no pecuniary damage has been sustained, but it is quite impossible to imagine a case of objective responsibility without proof of pecuniary loss. The fundamental principle of law which requires that public burdens should be equally distributed comes into application only when we find that a particular individual is bearing an exceptional burden, or, in other words, that there has been a material invasion of private property.

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[1] *Conseil d'Etat*, 3 *mai* 1911, *Combes*, *Dalloz Pér.* 1913 3. 85. Cf. *Conseil d'Etat*, 23 *novembre* 1906, *Bichambis*, *D.P.* 1908. 3. 32.

[2] *Conseil d'Etat*, 15 *nov.* 1907, *Coulomb et Desgeorges*, *Lebon*, p. 834.

[3] *Conseil d'Etat*, 17 *juin* 1910, *Lancelle*, *Lebon*, p. 486; *Conseil d'Etat*, 17 *mars* 1913, *Cie. de l'Est*, *Lebon*, p. 369.

[4] *Conseil d'Etat*, 15 *décembre* 1916, *Le Roussel*, *Lebon*, p. 549.

[5] See *Conseil d'Etat*, 19 *déc.* 1873, *Lambert*, *Lebon*, p. 958, where, however, there is perhaps an element of subjective responsibility. A clearer case of responsibility purely objective is *Conseil d'Etat*, 1*er juin* 1906, *Ville de Paris*, *D.P.* 1907. 3. 124.

In the second place, this depreciation must be imputable to the public work, that is to say, a causal connexion must be shown between the public work and the damage suffered. The liability depends upon this causal connexion which here supplies the place of the element of fault which by definition is absent in this case. But, according to the principle adopted by the *Conseil d'Etat*, it is not every kind of damage attributable to a public authority which involves of necessity the liability to make reparation. It must appear that the injury is greater than such as neighbours are normally bound to put up with (*excède le risque normal du voisinage*). It is only to the extent by which the public works, owing to their importance, their scale, or it may be to their character alone, go beyond the ordinary uses of property and the normal relations of neighbouring proprietors with each other that the administration is considered as having created a "risk," that is as having incurred liability.

As to the amount of the damages, this is left to the administrative jurisdiction (*Conseil de Préfecture*, and, on appeal, *Conseil d'Etat*), which has a general competence in suits concerning public works. It is to be noted that the rules of procedure followed by this body and its very elaborate organization of the use of experts in administrative affairs afford every facility for appreciating the importance of the injury, its relation with the public work and the greater or less degree in which this work creates an abnormal inconvenience to neighbours. We may recall, in conclusion, that the reparation always takes the form of damages. There is no remedy by way of an order for the restoration of the *status in quo ante*. Any order of this kind would fail to respect the independence and the right of initiative of the administration. Responsibility in this case simply puts an end to the pecuniary loss suffered by the individual. It places him on the same footing as everybody else in regard to a public burden, but it does not lead to the removal of the construction which causes the injury.

The Development of Objective Responsibility outside the Sphere of Public Works.—Administrative liability based on the idea of risk has not continued to be confined to the sphere of public works. During the last twenty years the *Conseil d'Etat* has in fact devoted its energies to making use of this new principle as a means of establishing the liability of the administration in all cases in which this appeared to be required by equity. Owing to the very diverse activities of the government this objective responsibility, as it has been worked out by the courts, can be studied and described only by an examination of the decisions themselves. One of the first cases in which the theory of objective responsibility, apart from fault, was applied was the case of *Lefébure*. The question there was as to an accident which had happened to the motor-car of a reservist who was making his way by the route prescribed to him by the military authority to the place where he was to be demobilized. No fault or carelessness having been proved against him, the State was found liable, although this liability could not be based upon any administrative fault.[1] But this decision cannot be considered as having settled the law. This was soon apparent from the decision in the case of *Ambrosini*.[2] This case arose out of an explosion on the ironclad *Jena* which caused the death of a young boy, the son of the plaintiff, and of several members of the crew. Here the *Conseil d'Etat* indicated its opinion that if the State was liable this could be only on proof of fault, for it held that in this case the State was not responsible because the death of the plaintiff's son was caused by *force majeure* and no facts had been proved such as would make the State liable. No better illustration, it may be observed, could be found of the inadequacy of the theory of fault in cases against the government. It is perfectly clear that the presence of an ironclad creates of necessity a risk exceeding the normal risks to which neighbours are exposed, and the damage caused by such an abnormal element of danger ought to be borne by the State and not by the victim of the injury. It was this principle which a few years afterwards was adopted and laid down by the *Conseil d'Etat* in a judgment which startled public opinion. The case arose out of an event which happened during the war. The explosion of the fort of *La Double Couronne on* March 4, 1916, caused damage to a large number of persons. The explosion had been brought about by the accumulation by order of the military authorities of a large quantity of bombs in the vaults of a fort situated near a place where there was a considerable population. With the inadequate means at their disposal for the organization of transport of ammunition the military authorities had been obliged to keep a large store of these dangerous engines of war in this place in order to supply them quickly to the armies in the field. One day the calamity occurred. Who was to bear the damage ? It was certainly not just to leave the victims without compensation. But if the State was to be made liable, then according to the rules of administrative liability, it would be necessary to establish administrative fault. This was what M. Corneille, the *Commissaire* of the government, sought to do. He felt the necessity of finding a ground upon which the State should be made liable. But the *Conseil d'Etat* realized that in the circumstances it was not reasonable to talk of administrative fault. On the contrary, considering the existence of the state of war those responsible for the national defence would have been in fault if they had not laid up these stores of bombs ready to be supplied to the troops. Accordingly, the *Conseil d'Etat*, taking a very broad view of the matter, on this occasion explicitly abandoned the theory of fault while at the same time finding the State liable. The circumstances attending the operations which led to the explosion of March 4, 1916, "created risks in excess of such as result normally from neighbourhood," to use the words of the decision, and the court drew the conclusion that "such risks were of a nature to render the State liable independent of any fault." To reach this conclusion they found it sufficient to point out that there was no dispute as to the fact that the explosion of the fort of *La Double Couronne* had been caused by the accumulation of bombs, that is to say, by the special risk created. The reasons given for the judgment in this case adopt and give greater precision to the rule formulated above in regard to public works: there must be damage suffered, a risk created, a relation of cause and effect between the two and the consequence will be liability on the part of the State.[1]

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[1] *Conseil d'Etat*, 5 *février* 1909, *Lefébure*, *D.P.* 1910. 3. 92. See the note on this case by M. G. Jèze, *Revue de Droit Public*, 1910, p. 72.

[2] *Conseil d'Etat*, 10 *mai* 1912, *Ambrosini*, *D.P.* 1914. 3. 73 (*id. Conseil d'Etat*, 6 *décembre* 1912, *ibid.*). See, on the case of *Ambrosini*, Hauriou, *Notes d'Arrêts*, vol. i, p. 510.

The decision in this case of *Regnault-Desroziers* marks a considerable advance in the theory of administrative liability. Its practical effect in altering the law appears clearly in a case which arose soon afterwards concerning an accident of a similar nature to that caused by the explosion of the *Jena* which gave rise to the case of *Ambrosini*. On this occasion it was the warship *Liberté* which had blown up. No distinction on the facts could be drawn between the two cases, but the result in the second case was precisely the opposite of that in the first. Thanks to the theory of risk, the *Conseil d'Etat* was now able to award damages to the relatives of the victim, though in the previous case, when proof of fault had been considered indispensable, the court had been obliged to refuse to grant reparation.[2]

This wide extension of government liability, going so far as to make the State liable even when the injury had been done by operations performed for the national defence, was later on carried still farther. The decision which goes farthest and is perhaps the boldest of all the judgments of the *Conseil d'Etat* in matters of this kind is the case of *Couitéas*, which shows us every possible extension of this principle. *Couitéas*, a landowner in Tunisia, had brought an action in the civil court[3] there complaining that a band of natives had squatted on his land. The court found in his favour and ordered the expulsion of the trespassers. The landowner, having obtained this judgment, applied to the *Procureur de la République* to execute it. This official, after having consulted the Minister of Justice, issued a requisition in legal form calling on the military authority to expel the natives from the lands in question. The military authorities, however, refused to obey the request, and in spite of attempts made by *Couitéas* in various directions, he found it impossible to obtain the execution of the judgment. The fact was that the Minister of Foreign Affairs had given instructions to the French representative in Tunisia that political reasons made it undesirable to expel these natives *manu militari*. The question then arose whether or not the State was liable to the landowner for the damage sustained by him owing to the fact that he had been deprived of one of the rights of a citizen, namely, that of obtaining execution of a judgment in his favour. It was out of the question, be it understood, to impute any fault to the State. On the contrary, the *Conseil d'Etat*, in its decision, recognized the correctness of the official refusal to lend the services of the military forces which were indispensable for carrying out the judgment. Such a procedure would have aroused serious disturbance in the country, and the *Conseil d'Etat* held that "the government in deciding as it did for the reasons and in the circumstances stated had done no more than to make use of the powers conferred upon it for the maintenance of order and security in a Protectorate." So far as this went, this was an approbation of the act of the government. But it did not follow that *Couitéas* was entitled to no reparation. On the contrary, on the theory of objective responsibility this reparation was due to him. In the words of the *Conseil d'Etat*, "the course followed having resulted in the plaintiff being deprived for an unlimited period of the whole use of his land he has suffered in the public interest a loss for which he is entitled to claim pecuniary compensation."

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[1] *Conseil d'Etat*, 28 *mars* 1919, *D.P.* 1920. 3. 1. *Note* Jean Appleton, add Hauriou, *Notes d'Arrêts*, vol. i, p. 686.

[2] *Conseil d'Etat*, 21 *mai* 1920, *Colas*, *2e espèce*, *Lebon*, p. 530.

[3] *Conseil d'Etat*, 30 *nov.* 1923, *Couitéas*, *D.P.* 1923. 3. 59, with the *Conclusions* of M. Rivet, *Commissaire du Gouvernement*. See Hauriou, *Notes d'Arrêts*, vol. iii, p. 698, and the notes of M. Gaston Jèze, *Revue de Droit Public*, 1924, pp. 74 and 208.

The principle of objective responsibility appeared in this case singularly well adapted to meet the difficulties of a case of exceptional delicacy into which political and diplomatic elements entered. We find here, as before, the same succession of ideas—damage, a risk created by the administration, not, it is true, in this case by a public work but by a political measure, a causal connexion between this risk and the damage sustained and, as a consequence, the liability of the State. It is always the idea of equality as regards public burdens which emerges from the consideration of the special damage suffered by *M. Couitéas* in the public interest.

The Limitations on the Liability of the State.—The case of *Couitéas* discloses so liberal a view of State liability that one is inclined to ask oneself whether this liability has not been extended so far as to cover every form of governmental activity. This would be in flat contradiction to the statement with which we began, namely, that non-liability is the rule and liability the exception. But such a conclusion would be too absolute, for there are in reality numerous acts of government which do not render the State liable either on the ground of fault or even on that of risk. The limitations to the liability of the State arise sometimes from the very nature of the activity which causes the damage and sometimes from the juridical nature of the act in which this activity is manifested. In the first case, it is the theory of "acts of State" (*actes de gouvernement*) which presents the obstacle to liability, and in the second case, this result is arrived at by the application of the principle of the irresponsibility of the State in its legislative capacity.[1]

The theory of "acts of State" is a complex theory which has been evolved in French administrative law, more particularly in questions as to the competence of the courts to entertain petitions for relief for acts done in excess of powers (*excès de pouvoir*). This remedy is, as we know, available in principle against any administrative decision of an executory character. But, nevertheless, there are some administrative decisions which are concerned with matters of such great importance that it is obviously inconceivable that they should be disallowed by a court on the petition of a private individual. Take, for example, a decree which proclaims martial law, which convokes or adjourns Parliament, which ratifies a treaty. Can one conceive that on the petition of any citizen a decree of such a kind should be annulled on the ground of *excès de pouvoir*, thus making the *Conseil d'Etat* pass judgment on the government upon questions which manifestly lie outside the scope of judicial functions? The competence of the remedy for *excès de pouvoir* must, then, be limited by consideration of the nature of the activity exercised in the decision in question, and the judgments of the administrative courts have not failed to recognize this limitation.

We shall not enter into a detailed account of the theory of *actes de gouvernement.*[2] It is enough to say here that, difficult as it is to find a legal definition of these acts, they are clearly distinguished by the attitude taken up with regard to them by the *Conseil d'Etat*. That court lays down as regards certain acts (which we shall call in the sequel *actes de gouvernement*) that it is not within its competence to examine their legality or their consequences in any form of process. As a matter of fact, these acts, which in this way escape from any possibility of challenge in the courts, fall into two great groups, of which one includes certain acts which belong to internal public law, and the other comprises certain acts which belong to public international law. Within the first group fall acts regulating the relations of public authorities such as decrees convoking or adjourning the Chambers or altering legislative procedure, and also decrees issued in the exercise of internal order and security (*police politique*), such as decrees granting pardon, measures for the public security, proclamation of martial law, health regulations.

[1] The same consideration (nature of the activity causing the damage) explains the irresponsibility of the State for acts done in the administration of justice. This is a general principle subject to certain exceptions created by the *loi du* 8 *juin* 1895, mentioned below, but it is concerned with a special subject which lies outside the field of administrative liability properly speaking, and we shall not deal with it. (See on the question L. Duguit, *Traité de Droit constitutionnel*, 2nd ed. 1923, vol. iii, p. 490; P. Duez, *La Responsabilité da la Puissance Publique*, p. 138.)

[2] See R. Alibert, *Le Contrôle Juridictionnel de l'Administration*, pp. 70 *seq.*; M. Hauriou, *Précis de Droit administratif*, 11th ed., 1927, p. 395; G. Jèze, *Principes généraux du Droit Administratif*, 3rd ed., vol. i (1925), p. 392; J. Appleton, *Traité élémentaire du Contentieux Administratif* (Paris, Dalloz, 1927), nos. 157 *seq.*

In the second group fall acts relating to any matter which is dominated by the rules of public international law, whether these acts are acts performed by a single government but producing international effects, such as acts of war, measures taken against particular persons in some cases, or the exercise of diplomatic powers by the State ; or whether the acts in question are international acts properly speaking, such as a treaty, against which or in connexion with which a private individual desires to institute legal proceedings.[1]

The theory of acts of State has been developed mainly in dealing with petitions for relief on the ground of *excès de pouvoir*. But in reality, this theory is applicable whatever may be the form of action, and it applies notably to those suits as to which the *Conseil d'Etat* has full jurisdiction both as to facts and law, such as actions of damages against the State.[2]

The practical result is that when the injury complained of was caused by an act of State the victim has no right to reparation. So far, then, as these acts are concerned, the rule that the State is not responsible still forms part of French public law. But this reservation does not invalidate the general principle of liability and must not prevent our recognition of the tendency of the judicial decisions which show up to the present time an ever-increasing extension of administrative liability. And, in fact, this liberalizing tendency on the part of the courts has not been without effect even upon the theory itself of acts of State. We have witnessed in France for a long time a steady process of cutting down the number of those acts for which the State incurs no judicial liability. Not only so, but in some cases where the idea of acts of State might well be invoked to paralyse the remedy, we find the *Conseil d'Etat* taking no notice of this theory and sustaining on the merits the liability of the State. The proof of this statement can be found in the case of *Couitéas* which we have just explained. It is certain that the political and diplomatic considerations which entered into that case would have been quite enough to justify the *Conseil d'Etat* in declining its competence if the court had wanted to apply strictly the theory of acts of State. Accordingly, this theory in the way in which it is now applied must be regarded as a kind of brake which the *Conseil d'Etat* can put on if those reasons of equity which as a rule impel the court to extend the liability of the administration should, in the special circumstances of the case, call for a restriction of that liability.

The second matter in regard to which there is in French public law a restriction of State liability results from the principle of the non-liability of the State in its legislative capacity. For it is a recognized principle that no court can entertain an action in whatever form it may be brought which calls in question an act of Parliament. And, in passing, it may be said that it is this principle which makes it extremely difficult for a French court to examine the constitutionality of a statute unless there is a law expressly giving competence to the courts in the matter. In the domain of responsibility the result of this principle is that a person who has suffered damage which has been directly caused by a law is, owing to that very fact, unable to obtain reparation for such damage. Nevertheless, seeing that the general evolution of the theory of responsibility is towards an ever wider extension of State liability, there is a certain movement in France in favour of making the State liable for damage caused by a law. In the first place, it is to be noted that a considerable number of laws contain a clause specially providing for compensation for damages which may be caused by the application of the law. This is the case with the law which prohibited the manufacture of matches by private individuals when this industry was made a State monopoly in 1872, with the law of 1866 which abolished the class of licensed agents for the purchase and sale of goods (*courtiers en marchandises*) and with the law of 1904 which suppressed employment bureaux (*bureaux de placement*) conducted by private persons for profit. In all these cases provision was made for indemnifying the persons injured by the law. But there is nothing here to suggest the general principle of liability. This has, however, been asserted by some writers, and notably by M. Léon Duguit, who maintains that the courts are entitled to award compensation for damage caused by a law though nothing is said about it in the law itself, and even though the law should expressly provide that no compensation is to be granted to those to whom it may cause damage.[1]

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[1] See as to this second group of *actes de gouvernement*, which are specially important, L. Trotabas, *Les Actes de Gouvernement en matières diplomatiques* in *Revue Critique de Législation et de Jurisprudence*, 1925, p. 342.

[2] See, for an explanation of the branches of administrative jurisdiction and for an account of *Contentieux de pleine juridiction*, Berthélemy, *Droit administratif*, 11th ed., p. 1113 (note by translator).

But the courts have been very slow to admit this theory, and on a review of the decisions one cannot say that French public law admits the liability of the State for damage caused by a law on the same footing as it makes the State liable for other juridical acts, or for physical acts which have caused damage. The reason is that a law is essentially an act of the highest authority of the State (*fait du prince*), and there is only one case where a person injured by a *fait du prince* can claim reparation for damage suffered. This is when the victim was in a contractual relation with the State or with a public administration and when this *fait du prince* by the damage which it causes to him interferes with the contract. In such a case the judge considers that it is part of his duty in the administration of justice to restore the balance which has been thus upset by granting to the party who had a contract with the State compensation for the damage done by the enactment of the law to his contractual rights. But this is a case of contractual liability based precisely on the breach of a contract, and the State, like any other party to a contract, is bound to respect its engagements. The ground of liability here is not that a law has been passed which causes damage but that the State has broken its contract. But most assuredly when we have a law of general application which extends to all persons equally, the special effect which it may have upon a person who has a contract with the State will not entitle him to sue for damages. Thus, the *Conseil d'Etat* refused to allow compensation to persons who had agreed by tender to purchase goods made by prisoners, and when the contractors complained that by reason of new laws as to the conditional liberation of prisoners and as to reduction of punishments, the number of prisoners had been diminished, and the profits of their contract had been lessened.[1]

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[1] *Traité de Droit constitutionnel*, 2nd ed., vol. iii (1923), pp. 512 *seq.*

In like manner when the law of April 9, 1898 (Workmen's Compensation Act) increased the burdens of employers, the *Conseil d'Etat* refused to admit the liability of the State to make good the loss sustained by contractors with the government in consequence of the more onerous conditions of the new law.[2]

And the same principle would undoubtedly apply as to the law of national insurance,[3] for this law was passed in the interest of society as a whole and it will affect government contractors like everybody else, as did the law of 1898.[4]

To sum up, the fact that the damage of which an individual complains was caused by the law always brings the case within this limitation of State liability. The *Conseil d'Etat* appears to adhere to its opinion, which was first enunciated nearly a century ago, that " the State cannot be held liable for the consequences of laws which in the public interest prohibit the exercise of a particular industry.[5]

Cases of Liability created by Special Laws.—Our discussion up to this point has been concerned with the general theory of administrative liability which the administrative courts to their great credit have built up apart from any legal texts upon which they could found. On that account, and also on account of the subtlety with which this theory has been constructed, this was the subject which demanded our attention in the first place.

But it is not true to say that administrative liability is entirely the creation of the courts : there are some cases in which this liability rests upon statute, and it remains for us to indicate the particular cases in which the legislator has imposed a special liability upon the State.

The laws of this character are extremely numerous, and it is no part of our intention to describe their working in all the separate branches of governmental activity. A great number of public services of a special kind, such as customs, railways, post telegraphs and telephones, education, etc., have their own peculiar rules of liability which could not be explained without a detailed description of the conditions under which these services are carried on.[1] It will be sufficient to mention here the most important of the laws of this kind creating a special liability which have been passed in recent years. It is to be observed that they have one feature in common: they all rest on the idea of risk, that is to say of national solidarity. Their tendency is to throw upon the nation as a whole (quite apart from any notion of fault) the burden of making good a loss sustained by a citizen or by a particular part of the population for which nobody else is liable.

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[1] *Conseil d'Etat,* 3 *avril* 1903, *Mistral et Pavie, Lebon,* p. 306.

[2] *Conseil d'Etat,* 10 *janvier* 1908, *Noiré et Bayssac, Lebon,* p. 25, with the *Conclusions* of M. Tardieu.

[3] *Loi du* 5 *avril* 1928, *D.P.* 1929, *4me partie.*

[4] As to the particular situation resulting from contracts with the government and the effect of this contractual relation on its responsibility, see L. Duguit, *op.* and *loc. cit.*, p. 402.

[5] *Conseil d'Etat,* 11 *janvier* 1838, *Duchatelier,* cited in *Dalloz, Rép.* vo. *Impôts indirects,* no. 607. See in the same sense, and for several other cases, *Conseil d'Etat,* 26 *février* 1857, *D.P.* 1857. 3. 81 ; 15 *mai* 1874, *D.P.* 1875. 3. 41 ; 4 *avril* 1879, *D.P.* 1879. 3. 49. See also, as to liability for legislative acts, *Dalloz, Rép. Pratique,* vol. x (1924) vo. *Responsabilité civile,* nos. 287 and 288 and the references, especially to Teissier and Michoud.

The first application of this idea to which we shall call attention is the old law of June 8, 1895 (Art. 446, *Code Inst. Crim.*) on the revision of criminal proceedings and indemnities for the victims of judicial errors. The provisions of this law have, moreover, been specially extended more recently to the revision of judgments rendered during the war by the special tribunals instituted at the time.[2]

This law with its recent extension is particularly interesting, because it concerns an activity of the State, namely, the decisions of the courts, to which, as we have seen above, French law has always accorded the privilege of non-liability, and because it admits and makes express provision for pecuniary reparation by the State. This liability of the State is to make good the loss suffered apart from all idea of fault on the part of the judge: the obligation to repair the loss is based upon "social risk." [3]

The same idea underlies the law of April 16, 1914, which creates a special liability on the part of the *communes* and on that of the State in the case of disturbances of the peace and riots. This law, which modifies Arts. 106–109 of the *loi d'organisation municipale du* 5 *avril* 1884, provides that the local administrations and the State shall be liable in varying proportions (according to the manner in which they have exercised respectively the police power which belongs to each of them) to make good the loss sustained by persons who have suffered special damage on the occasion of a disturbance of the peace. For, it is not just to make private persons suffer for the breakdown of the local police authority, and the effect of the law is to throw this loss upon the mass of the taxpayers.[1]

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[1] See, as to the postal service, M. Waline, *La Responsabilité de la Poste d'après la Jurisprudence administrative, Dalloz, Hebdomadaire*, 1929, *Chronique*, p. 69.

[2] *Loi du* 29 *avril* 1921, Art. 20.

[3] This want of fault appears from the forms of pleading in the petition for revision which is asked for as a rule on the ground of some new fact or document which had not been discovered at the previous trial, that is to say the petitioner asks in effect to prove that the previous judges on the facts before them did not commit any fault. See, for an illustration of this liability of the State for an act of jurisdiction, *Cass. Crim.*, 28 *déc.* 1923, *D.P.* 1924. I. 66; *Cass. Crim.*, 13 *juillet* 1922, *D.P.* 1922. I. 228.

In the next place we may mention the great law of April 17, 1919, upon the reparation of damages caused by acts of war. " The Republic declares the equality and solidarity of all French citizens in regard to burdens caused by the war" (Art. 1). From these premisses it results that " damages ascertained of a material character and directly caused by acts of war in France and in Algeria to immoveable or moveable property entitle those who have suffered such damage to full compensation." The benefit of this law has been extended, first, by the law of 24 *juin* 1919 as to compensation to civilians injured by the war, and secondly, by the law of 3 *mai* 1921 as to the reparation of damage caused to third parties by accidents occurring in government establishments in which work is being carried on for the national defence. These are the principal laws which impose liability on the State.[2] In appearance they are illustrations of exceptional legislation, but they fall outside the framework of the laws regulating certain public services which create special rules of liability for them and they illustrate the principle of risk.

To complete the list of such special laws, we should have to add the laws concerning military and civil pensions which in their field govern the liability of the State for damage suffered by its agents. If we look at the special laws in the bulk we have before us a vast number of cases in which the legislator has extended the liability of the State as it was fixed by the courts, and has addressed himself with ever-increasing liberality to the task of broadening the basis of governmental liability.

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[1] See, on this point, L. Michoud, *Théorie de la Personnalité morale*, 2nd ed., 1924, vol. ii, p. 244, note 1.

[2] See P. Duez, *La Loi du* 3 *mai* 1921 *et la théorie générale de la reponsabilité* in *Revue du Droit public*, 1922.

THE NEW COMPANY LAW OF HOLLAND.

[*Contributed by* DR. S. GARGAS, *Lecturer in the University of Amsterdam.*]

Necessity for Change in the Law.—In his valedictory address to the students of the University of Utrecht on July 8, 1907, the well-known professor of commercial law, Professor Molengraaff, said: "The best feature of the law as to companies with limited liability which we have in the commercial code of the Netherlands is undoubtedly that it is so defective that one can hardly say that there is any law at all. It is less of a hindrance than it would be if there were more of it." These few words are at the same time a sufficient characterization and a sufficient condemnation of the law on the subject which prevailed in the Netherlands till lately and dated from 1836. No doubt the law was too defective to prevent the increasing growth of commercial companies, but it was impossible to rest content with such a state of the law.

Defects of the Old Law.—The number of limited companies in the Netherlands has increased to an extraordinary extent in the last hundred years, and more especially in the twentieth century. But the figures fail to disclose many relevant facts. As early as 1906 the Deputy Troelstra drew attention to the fact that in the case of eighty-five companies floated in the period 1894–1902 the price of the shares on allotment was much higher than that at which they were quoted in 1906. At the current price in 1906 the total value of the shares was only one-fourth of the price at which they had been issued. Whereas the original value was forty millions of guilders, thirty millions had been lost. He also pointed out the increase in the number of bankruptcies of Dutch enterprises and particularly of limited companies. He considered that the great defect of the law was that it did not ensure a fair disclosure of the value of the properties which were to be acquired by the new company. These properties were in many cases of little value. Their owners wanted to get rid of them and they were palmed off upon the investing public, who were induced to take shares by misleading statements in the prospectus. He alleged further that in many cases there was great want of due care and control on the part of directors and inspectors (commissaries) of companies and that these persons frequently took their responsibilities too lightly. The same person was in many cases commissary of several companies at once. In 1904 there were commissaries who inspected at the same time as many as nineteen companies, and one person was known to hold thirty-two commissaryships. Some members of Parliament held six or seven, or even twelve commissaryships. Under such circumstances it was impossible that there should be real supervision. In many of the companies there was much nepotism, and the persons who were expected to exercise supervision were related to those whom they were to control. Many companies continued to exist without paying any dividends, the profits not being more than sufficient, if indeed they were sufficient, to satisfy the claims of the mortgage banks and the bond holders. In many cases the mortgages themselves were insufficiently secured owing to overvaluation of buildings and plant. For all these evils the law afforded no remedy at all. On various occasions the defective condition of the law was mercilessly exposed in the Dutch Parliament, and after half a century of discussion the new law of July 2, 1928, was passed.

The Law of July 2, 1928.—Differences of View as to the Reform.—The chief problems discussed in Parliament and the legal journals were the following: How far should freedom of contract be restricted? What should be done about the so-called preventive system? What should be the duty of companies to publish a balance-sheet showing the state of profits and losses and should this duty vary according as the company was "open" or "closed"? What protection should be afforded to minority shareholders either by giving them the right to demand an inquiry or by allowing the so-called oligarchical clause restricting the power of the majority at the general meeting to choose directors and commissaries?

Freedom of Contract and its Restriction.—The Royal Approval.—The preventive system, originally imported from France, which had long prevailed in the Netherlands was in itself a restriction of contract. A limited company could not come into existence before it had received the approval of the State. Until this approval had been obtained the company could only be considered as in course of formation. This system, which recalls clearly the theory of the police State, is calculated if properly applied to prevent many abuses in relation to new companies. Such a system might secure that only such companies should be approved of as were essentially sound. In the Netherlands the original intention had been that the Royal approval should only be granted after adequate inquiry into the situation. But this position had not been maintained, and in course of time the grant of the Royal approval as was stated by the Minister of Justice in 1910 had come to be a mere formality. The rule had come to be that the approval must be accorded unless the objects of the company were against good morals or public order or unless the articles contained clauses contrary to law. Upon this footing the Royal approval had ceased to afford any substantial protection to the public and might even do more harm than good because ignorant persons might believe that the Royal approval was evidence of the soundness of the company.

Under the new law the preventive system has not been abolished but it has been very much restricted. In place of the Royal approval there must be a declaration by the Minister of Justice that he has no objection to the memorandum of the company which has been submitted to him. The Minister can refuse to give the declaration only in the cases enumerated in the law, which are in fact the same as under the old law. The new system has the advantage that it does not involve the person of the sovereign and that ignorant persons are not likely to be deceived into thinking that a company is sound because it has received the " Royal " approval. In the parliamentary discussion it was suggested that before the declaration of the Minister was issued there should be some inquiry made as to the intrinsic soundness of the enterprise, and in this connexion reference was made to the English " Registrar of Companies." But so far as I am informed, this institution of the English law does not secure what the Dutch legislators were in search of. In my opinion it is to be regretted that the proposal for a preliminary inquiry was not more fully considered. It is to be said, however, on the other side that business depends essentially upon private initiative and that though the State may to a certain extent exercise control it cannot supply this initiative. It is clear, at any rate, that where the State professes to exercise control in economic matters this control ought to be a reality and be exercised in accordance with the best expert advice.

Nationality of Companies.—Principle of Domicile.—The principle of free trade, traditional in Holland, underlies the sections which deal with the nationality of companies. Upon this matter there are two well-known theories: one that the nationality of the company depends upon its domicile, a theory which may be regarded as the *communis opinio doctorum* in the Netherlands, and the other, what has been styled the " nationalist theory," according to which the nationality of a company is determined not by its domicile but by the nationality of its promoters or shareholders. This theory has some affinity to the doctrine of *jus sanguinis* in private international law. According to Dutch law the nationality of the promoters, the shareholders or the majority of them is as to this matter of no importance. It is the domicile or home of the company which alone determines its nationality. This principle of Dutch law is, as already indicated, in conformity with the whole economic policy of the Netherlands, that is the policy of the open door. And a distinguished statesman, Dr. M. W. F. Treub, a former Minister of Finance, pointed out with justice that although this policy was not without danger when it allowed foreign capital in the Netherlands to prevail over Dutch capital, yet it would on the other hand be contrary to Dutch tradition to put difficulties in the way of foreign traders who wanted to carry on business in Holland, or to discourage enterprises carried on with foreign capital. In his view a sufficient guarantee was afforded by the publicity given to the formation of companies. At the first blush the question as to the nationality of a limited company might appear to be of merely theoretical importance, but this is by no means the case. In times of political crisis, such as a war, the question becomes one of great practical importance. If a limited company is to be considered as a foreigner or even as an enemy it will probably be subjected to very considerable restrictions in carrying on its business. This consideration may be less important in the Netherlands, which have enjoyed peace and freedom for a long time, than in some other countries. But even if we leave this consideration out of account, the fact that every limited company established in the Netherlands possesses the right of an inhabitant is of considerable importance.

Restriction of Autonomy of Company by Judicial Decisions.—In other ways the fundamental problem as to how far it is wise to restrict freedom of contract, a problem which enters into so many economic and political questions of the present time, has had to be faced in the new Dutch law as to limited companies. The number of legal provisions of a compulsory nature applicable to them has been considerably augmented and, in addition, the Dutch legislator has laid down for the first time a series of regulations or model articles which are to apply to the company unless the articles of association otherwise provide. Before the new law was passed there were many important points of company law as to which there were neither obligatory provisions nor model articles. And in the last place, freedom of contract has been considerably restricted by the fact that upon some matters power is given to the courts to overrule the decisions of a company, whereas, previously, companies had been completely autonomous. As we shall see later, this is the case in regard to the rights of a minority of the shareholders to convoke a general meeting or to demand an inquiry into the situation of the company.

Protection of Minority of Shareholders.—The new provisions as to the publication of a balance-sheet which sufficiently discloses the state of assets and liabilities are designed not for the protection of the minority of the shareholders but for the protection of the creditors in the widest sense of the term. This obligatory publication of the balance-sheet provoked in Parliament and in the country a violent and long-continued opposition. The new law makes such a publication compulsory upon all limited companies in the Netherlands irrespective of whether they are " open " or " closed " companies, though in many important respects these two classes of companies stand upon a different footing. In the Netherlands a company is considered as " open " when it applies to the open money market in order to raise its capital and its shares have a quotation on the stock exchange. All other companies are called " closed." In Holland the number of " open " companies is relatively small. According to an inquiry made in 1920 by the Rotterdam Chamber of Commerce there were out of 17,061 companies only 653 which were " open." The " closed " companies include the great mass of all those enterprises which began as private firms and had become in many cases very prosperous but were exposed to the danger of being wound up upon the death of the individual trader or of a partner when it would become necessary to divide his inheritance. In most cases it was to avoid this risk and to secure the continuation of the business that it was turned into a limited company. There was, of course, also the advantage that the owner of the business, whether an individual or a partnership, would in this way secure the benefit of limitation of liability. This development is in no way peculiar to the Netherlands private companies, and even one-man companies are well known in England, and in France and in Germany there has been analogous growth of *sociétés à responsabilité limitée* and *Gesellschaften mit beschränkter Haftung*. In business circles in Holland there has of late been a movement in favour of greater variety in the forms of companies, following the example of some foreign countries. This movement has achieved one success in bringing about the so-called balance law of 1929 (law of June 25, 1929, O.J. 363).

The desire to afford some protection to a minority of the shareholders in a company was one of the main motives of the new Dutch law and the provisions on this subject are particularly important and interesting. This protection is of three kinds. In the first place the court (in this case the president of the court) may grant a petition presented by one or more of the shareholders asking for the convocation of a general meeting. It is needless to say that only a shareholder who is in the minority can present such a petition. The decision of the president of the court is in such a case substituted for that which belongs normally to the majority of the shareholders acting generally through the directors and the board of commissaries.

The Right to Demand an Inquiry.—In the second place, another protection given to the minority of the shareholders consists in the so-called right of inquiry which is modelled on the English Companies Act of 1862 and gives to shareholders for a certain amount the right to demand an inquiry into the situation and the management of the company. Under the English Act this inquiry is made by the Board of Trade, whereas by the Dutch law it is made by accountants designated by the court in its discretion. This discretion is, however, limited as to one point, namely, that no director or commissary of the company can be appointed as one of the accountants to conduct the inquiry. The advocates of this new right of inquiry contended that the law would have valuable results even although it should turn out that the right of inquiry was rarely exercised. It may be very useful to post a sentry, and the advantage of doing so is not estimated by the number of times that he is attacked. On the other hand, the opponents of the new law argued that the petition for an inquiry might give a bad name to a company which did not at all deserve it, and might injure its credit, and this argument is not without weight. But, on the whole, the balance of convenience would seem to be in favour of the right of inquiry. Moreover, the law has introduced a number of guarantees against the reckless use of the right. The petition must be presented by shareholders representing at least one-third of the capital. A motion for an inquiry must have been previously made at a general meeting of the company or to the directors or the board of commissaries. The court will not grant the petition unless an *a priori* case is made out against the management of the company and unless its financial position appears doubtful. Finally, the petitioners run the risk of having to pay the costs of the inquiry, for which they must find security beforehand, and they may, in addition, be found liable in damages if the petition is rejected. The guarantees against reckless petitions are, in fact, so onerous that it has been contended that the right of inquiry is illusory, but this fear does not seem to be well grounded. Another proposal directed to secure the same object did not perhaps receive so much attention as it deserved. This was a suggestion that the court might itself conduct a judicial inquiry if this course was assented to by the organs of the company. The inquiry by accountants under the present law cannot be considered as judicial and it is conceivable that the inquiry might be fruitless because it was not properly conducted. In my opinion it is to be regretted that this alternative method was not accepted.

The Oligarchical Clause.—Another form of protection of minority shareholders about which there has been much discussion is the so-called oligarchical clause not infrequently found in the articles of association of Dutch companies and now found for the first time expressly given, although with certain restrictions, in the model articles. Some of the most important companies in the Netherlands have introduced the oligarchical clause in their articles of association and have thereby greatly restricted the powers of the shareholders at a general meeting. This is so in the case of the *Nederlandsche Handelmaatschappy*, the *Royal Dutch Petroleum Company*, the *Stoomvaartmaatschappy Nederland*, etc. In all these companies the nomination of the directors and the commissaries is not left to the free choice of the body of the shareholders. The " Royal Dutch " gives the right to the preferential shareholders together with the directors and the commissaries to nominate two persons for every vacancy and the shareholders at the general meeting must choose one of these. If only one person is nominated the general meeting must choose this one, and it is only when no person is nominated that the meeting has a free choice. By the articles of the *Nederlandsche Handelmaatschappy* directors and commissaries are nominated by the directors and commissaries acting together, two persons being nominated for each vacancy. The preferential shareholders have no right of nomination. In the general meeting it is only certain shareholders who are entitled to vote, that is to say, Dutch shareholders who have been on the register of the company for at least six months as holders of shares to the value of 4,000 guilders or more. If the directors and commissaries have not exercised their right to nominate, the shareholders at the general meeting can elect. In the *Stoomvaartmaatschappy Nederland* it is only the commissaries who have the right to nominate persons as directors and commissaries.

These autocratic methods, so little in harmony with the democratic idea which underlies limited liability companies, have on many occasions been the subject of violent attacks in which it has been pointed out that the oligarchical clause is in conflict with the fundamental doctrine of the autonomy of companies. On the other hand, the oligarchical clause has found many ardent supporters in the Netherlands. The clause came into existence originally out of the fear that the company might become the victim of foreign competition and that foreign rivals might get possession of a majority of the shares before this was realized. The aim of the clause was to protect the shareholders against such a surprise and against the manipulations of competitors by which they might be forced into actions prejudicial to them. The parliamentary discussions on the new law indicate clearly that the oligarchical clause was conceived as a means of preserving the national character of Dutch companies. This nationalist argument was, however, sharply criticized by the Catholic deputy Koolen, who pointed out that the Rumanian international petroleum company, which was a Dutch company, had been transferred in 1918 to the *Steaua Romana*, a German concern, by means of continual co-optation. The argument which saved the oligarchical clause in Parliament was not so much the nationalist argument as a consideration in the interests of the middle classes. It was felt that in the numerous small family businesses which are turned into companies in order to secure the benefit of limited liability co-optation might be the best way to secure good management. If the shareholders agreed to accept the oligarchical clause in the articles there was no reason why they should be prevented from doing so. If they changed their minds afterwards there were always means of altering the articles. So far as the public interest is concerned it ought not to be forgotten that when a conflict occurs between the directors and the shareholders the interest of the shareholder is limited to making the greatest immediate profit, whereas the directors are interested in the continued existence of the enterprise.

Increased Responsibility of Promoters and Directors for the Prospectus.—The new law contains a series of provisions in the public interest increasing the responsibility of promoters for statements made in the prospectus and of directors and commissaries for the performance of their duties. It has been suggested in some quarters that these provisions are so strict as to tend to discourage the wealthy classes from investment in Dutch companies. After careful consideration of the new law I do not think that these fears are well founded. The prevention of bubble companies and unhealthy speculation is not only greatly in the interest of the small capitalist but it will also help to preserve the good name of the Netherlands as a country of sound commercial undertakings.

COMMERCIAL TRUSTS IN PRIVATE INTERNATIONAL LAW.

[*Contributed by* DR. MAX RHEINSTEIN, BERLIN.]

CARTEL Law, *i.e.* the law of those " combines " of independent industrial enterprises which aim at influencing the market by regulating competition, has met with the special interest of post-war legal science. It has been dealt with exhaustively in the legal literature of present-day Germany, where the economic system shows a marked tendency to the concentration of enterprises and to the regulating of competition. Upon this subject an important work has been published recently.[1]

From the legal point of view the chief questions are those concerning the most appropriate legal form of organization and the legal validity of restrictions on competition and of measures intended to influence the market, more particularly measures which aim at crushing outside competitors. In England these are in the main the problems which are dealt with under the heads of " restraint of trade," " conspiracy " and " interference with business and occupation."

These issues, raising as they do difficult problems in national law, become extremely intricate from the moment that a cartel extends beyond the borders of a single State and includes members in more than one country. At its Warsaw meeting of 1928 the International Law Association included these problems among its subjects of discussion, under the title of " International Trust Law," and the two members charged to report on the subject, Dr. Fritz E. Koch of Berlin and Dr. Franz von Király of Budapest, in delivering their reports endeavoured to give a general survey of the problems arising out of these novel forms of international industrial concentration. Dr. Wolff's book gives a systematic consideration of these problems and an attempt at their solution.

In the first place the author states the very important fact that the difficulties arising in the field of international " trusts " appear so insurmountable in many cases to the parties concerned that in view of the present chaotic state of the rules of Conflict of Laws they not only abstain from subjecting their cartel to the laws of an individual State, but they also try to make the cartel as independent as possible of the laws of any particular State whatever. This is done by agreements that legal disputes between members of the cartel shall not be submitted to the ordinary State courts but shall be decided by their own special Courts of Arbitration in cartel matters. And these Courts of Arbitration are to decide disputes not according to the positive laws of any individual State, but according to those trade conceptions and commercial usages and customs which are internationally and generally accepted. This independence of the laws of the State and of the official administration of justice is increased by the tendency to abstain from resorting to the regularly constituted courts of the State even in order to have awards enforced. In case of moral pressure not being sufficient to bring about the performance of an award, provision is made for indirect coercion by boycott-like measures of various kinds or by the realization of bonds or other securities which must be deposited by the members in advance with a third party agreed upon as depositary. This phenomenon, which in international business relations plays a rôle of general importance not only in the field of cartel law, but on a much larger scale including international trade transactions in general, is of the highest interest from the point of view of comparative law and of legal history. Side by side with the legal systems organized by the various States there can be found—even if only on a small scale—the beginnings of an international organization based on the standard of honour in business, and applied in practice by special courts of merchants, a development similar to the "law merchant" of the Middle Ages. From the point of view of theoretical jurisprudence, the problem arises whether a body of rules not enforceable by the State can be called "laws." It is a problem not very much unlike that offered by the ecclesiastical law and by the Law of Nations.

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[1] *Die Rechtsgrundlagen der Internationalen Kartelle,* by Dr. Reinhold Wolff. (Berlin: Heymann, 1929.)

Such attempts to steer clear of the positive law of the State cannot wholly attain their aim. The measures of coercion available against cartel members will never be so effectual as those which can be enforced by a State under its own laws. And, moreover, if a State by its laws restrains the formation of or the participation in cartels, those prohibitive prescriptions cannot be eluded by the agreements of traders. Cartels agreed upon to take effect for a long period, and demanding such sacrifices from their members as, for instance, material restrictions on sales, exchange of patents, and payments into a common fund, must try to find an organization which will be valid under the positive law of the State. If a cartel's membership extends beyond the boundaries of a single State, the problem arises, under which system of law the cartel is to be considered in its various relations. The ascertainment of the competent body of law to govern the cartel is, for instance, important in order to be able to decide whether and, if so, to what extent the members are bound by the obligations agreed upon, whether and, if so, to what extent they are entitled to withdraw their co-operation, in what manner they are entitled to the property, if any, of the cartel, how the administrative business of the cartel is to be managed, and in particular, whether resolutions of the cartel need the approval of all members or whether a minority can be outvoted by a majority of members. The difficulties which face the promoters of an international cartel are particularly serious for the reason that the laws of the separate States not only differ from one another in themselves, but also because these systems have different rules concerning the Conflict of Laws. For instance, a cartel not incorporated as a legal entity is considered in Germany as a non-incorporated association (*Gesellschaft des bürgerlichen Rechts*) and therefore subject to the law of the " seat " of the association. On the other hand, French law would subject the same cartel as an innominate contract to the *lex loci contractus*. Dr. Wolff maintains rightly that many of these difficulties can be overcome by careful drafting of the cartel agreement and in particular by an express agreement as to the national system of law to which the members intend to subject their cartel. The author is, however, compelled to admit that the autonomy of the parties is restricted by the rules of public order in each State. When the parties try to subject their cartel to the laws of a State which does not forbid cartels, this will not prevent a court of another State from applying its own rules of public order. Here it would be advisable to point out that recent tendencies, especially in France, aim at restricting still further the measure of private autonomy which up to the present at least has been generally recognized. It is now contended that the judge should be bound not only to apply the rules of public order of his own State but also those of the legal system which according to the principles of private international law in force in his State ought to govern the matter.[1]

If this view, which is based on a logical fallacy, should become generally accepted, a situation would arise in international legal relations, and particularly as regards international cartels, which would be quite intolerable.

From the fact that the laws of contract in practically all civilized States admit—with the above-mentioned restrictions—the autonomy of the will of the parties, Dr. Wolff deduces as a practical consequence that the court might at the outset refrain altogether from looking for a national system of law which is to be applied. On the contrary, he ought not to construe the intention of the parties by the laws of any individual State, but rather in the light of the opinions and customs of trade which prevail generally in dealings between traders of different countries. The author points to the fact " that the contracting parties, when they combine to form an international cartel, have in common certain legal conceptions which in trade circles are entertained generally or at least with slight differences. Accordingly, if a controversy arises as to the interpretation of the document, the intention of the parties should be decisive, and this should be discovered by consideration of the legal ideas common to all the parties concerned." It is only after the true sense of the agreement has been arrived at by this method of interpretation, that the question arises whether there exists any obstacle under any of the several national laws concerned which prevents the contract from receiving effect. This idea is well worthy of consideration.

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[1] Compare in this connexion the discussions of the International Law Association, Warsaw, 1928; Caleb, *Essai sur le principe de l'autonomie de la volonté en droit international privé*, Paris, 1927; A. de Lapradelle et J. P. Niboyet, *Répertoire de droit international*, t. II, Paris, 1929, v. *autonomie de la volonté* (Niboyet).

It would afford a simple and suitable solution of the problem. It is, however, very doubtful, in view of the theories which now prevail in private international law, whether Dr. Wolff's suggestion will be accepted.

The author points out[1] quite correctly that the determination by a court of the system of law which governs the instrument creating the cartel by no means settles all the legal questions which may arise. It may be, for example, that the form of the agreement is governed by one system of law (*locus regit actum*) and its substance by another; or again, the capacity of a business concern, *e.g.* a commercial company, to join a cartel depends upon the personal law of the concern. And in this connexion it may be pointed out that when a corporation proposes to enter a cartel there may be difficulties arising from the Anglo-American doctrine of "ultra vires."

If the parties concerned wish to organize their cartel as a body corporate, then a whole string of questions arises pertaining to the problem of ascertaining what system of laws is to give legal capacity to the cartel and is to govern the organization of the new corporation. It is particularly difficult to know how to treat the so-called "*Doppelgesellschaft*" (double company or binary company), *i.e.* the case in which the members of the cartel not only enter into mutual obligations for the purpose of regulating competition and influencing the market, but also at the same time create a separate corporation to act for certain special purposes as an organ of the cartel and to be in the position of a trustee in making sales and purchases for the cartel and in administrating the cartel's property or acting generally as holder of the rights to which the cartel is entitled against its members. The German theory of cartel law in this case takes the view that there are here two separate associations existing one beside the other, (1) the cartel as a non-incorporated association or as a mere innominate contract and (2) the corporation acting as the organ of the cartel and having certain legal relations to the cartel itself and also towards the individual members of the cartel. The author examines in detail and with excellent judgment the question, What system of law applies to all these various legal relations?

The cartel is a phenomenon which is differently regarded by the various different States according to their respective economic policies. Cartels are tolerated in some States, encouraged in others, while other States again fight against them. But in all States we find laws imposing certain restrictions at least on cartels. Such laws are intended to prevent abuses, such as undue restrictions of the commercial freedom of members, or undue excessive measures of coercion on outsiders. In international cartels it is not only the laws of one State which must be investigated, but those of a multiplicity of States. The author subjects these questions to a thorough examination. In order to ascertain what laws are applicable he lays down as a general principle that a cartel is governed by the laws of that country in which the cartel carries on its operations.

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[1] Pp. 70 *seq.*

Here it would have been advisable to examine more closely what is to be understood by the "operations" of a cartel. In considering the laws of the various States it would appear that two groups of laws should be distinguished. On the one side we have laws intended to prevent unfair restrictions on the commercial freedom of members of the cartel, and on the other hand we have laws which aim at preventing cartels from exercising an undue influence in the way of restricting or controlling the market, and in particular of producing an artificial raising of prices. To the first group belong, for instance, the English laws against restraint of trade and Art. 8 of the German Cartel Regulation of 1923, under which a withdrawal from a cartel can be made for any serious reason by any party concerned without previous notice. To the second group belong, for instance, Art. 419 of the French Penal Code (altération des prix), the American Anti-trust Laws, and Art. 4 of the German Cartel Regulation (under which the *Reichswirtschaftsminister* (Minister of Public Economy of the Reich) is entitled to take measures against cartels endangering the economic life of the nation or the public welfare). Laws of the first group will be always applied to a cartel—even a foreign one—which infringes the commercial freedom of a subject of the State in which the action is brought, whether his quality as such subject is determined by nationality or by domicile. The laws of the second group apply as a general principle in all cases where the home market is affected. The author examines how far this general statement requires to be modified. His reasoning here would have been more lucid if he had laid more stress on the difference indicated above between these two groups of laws.

In the last part of his book the author deals with the much-discussed problems of international commercial arbitration, in so far as they are important for cartel matters. Compared with the excellent argumentation of the preceding chapters this part of the subject has been treated somewhat too briefly. The section dealing with the enforcement of foreign awards gives us only an imperfect idea of the methods in which this problem is dealt with in various States. In his rather brief remarks about the enforcement of foreign awards in England (p. 169) the author may have been influenced by his having misunderstood the decision *in re Merrifield, Ziegler & Co.* v. *Liverpool Cotton Association* (105 L.T.R. 97). At any rate this chapter does not give an absolutely correct picture of the English situation, which in reality offers very favourable terms to the execution of foreign awards. But by no means every State makes the enforcement of foreign awards so easy as does England, and still more Germany; accordingly, the practice has grown up in cartel matters of depositing bonds to be forfeited in case of non-performance of the award. This practice, as already stated, is recommended by Dr. Wolff, but upon this matter he would have done well to consider the question whether such a declaration of forfeiture may not be invalid by the laws of public order in some States. The tendencies unfavourable to cartels, which exist in several countries, do not exclude such a possibility.

RECENT DEVELOPMENTS AFFECTING DIPLOMATIC PRIVILEGES AND IMMUNITIES.

[*Contributed by* MONSIEUR HENRI T. P. BINET, *Geneva.*]

SINCE the League of Nations was instituted, considerable progress has been made in the realm of international law. Among the many causes which have contributed to the revival of interest in this subject may be mentioned treaty stipulations. Thus it was that the principles governing diplomatic privileges and immunities found a new and convenient focus in Art. 7, para. 4, of the Covenant of the League, which stipulates that:

> Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities.

The precise scope of this provision has been the object of several discussions which have brought further enlightenment on the whole subject. The general principle there enunciated cannot be said to have elicited any measure of opposition, but certain phases of its application have at one time or another evoked somewhat conflicting theories. It is not proposed to consider here the multifarious aspects of these immunities, but merely to deal with the grant of diplomatic privileges to officials of the League when engaged on the business of the League *in their own country*. Officials of the League also include officials of the International Labour Office in virtue of Art. 392 of the Treaty of Versailles and the corresponding articles of the other Treaties of Peace which provide that: " The International Labour Office shall be established at the seat of the League of Nations as part of the organization of the League."

Different opinions have been held as to whether a diplomatic agent is entitled in international law to diplomatic privileges and immunities when engaged on official business in the country of which he is a national. Certain States have admitted their own subjects or citizens to the benefit of these immunities when they were accredited to them as representatives of foreign States. Others, on the contrary, have not only refused to accord them such immunities, but have even declined to accept their appointment as representatives of foreign Powers.[1] An analogous although independent situation arises when officials of the League exercise their functions in their own country. The answer to be given in the latter instance, while closely related, is nevertheless unprejudiced by the contradictory solutions which have unhappily prevailed in the cases alluded to above.

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[1] Fauchille, *Traité de Droit international public,* t. 1er, 3ème partie, pp. 39 and 60.

There is this difference to be observed. The immunities of an ordinary diplomatic envoy are derived from the fact that he is accredited to the government of a particular country as representative of another State, whereas officials of the League are not as such accredited to a given State nor are they representative of one, but the diplomatic privileges they enjoy are attached to their function as international officials of international institutions. In both instances the purpose of the immunities is identical, that is, to afford to these diplomatic agents special facilities in the fulfilment of their official duties. But in the one case such duties partake of the nature of a national mission, whereas in the other they assume the character of a purely international function. Moreover, when a diplomatic envoy is accredited to a particular State, he is accorded the relevant immunities in accordance with the rules of international law recognized by that State. Whereas officials of the League are granted the same immunities by all the signatories to the Covenant. Hence a State which has chosen not to grant diplomatic privileges to its nationals when the latter are accredited to it as representatives of foreign countries, may not, if a party to the Covenant, deny such privileges to its nationals when they are engaged on the business of the League in their own country.

All States Members of the League must apply in the same manner the provisions of the above-quoted Art. 7, para. 4, of the Covenant which establishes no distinction as regards the nationality of the officials concerned. To say that there was implied an exception to the effect that these immunities were not to be granted by a State to its nationals, is not at all convincing. In the first place, the position of international officials is different, as was shown above, from that of ordinary diplomatic envoys ; secondly, even in regard to the latter, such an exception is not generally accepted in diplomatic practice[1] ; and thirdly, it is incompatible with the immediate purpose which the authors of the Covenant had in mind. Their intention was that officials of the League organizations should be permitted to discharge with the least possible obstruction the international duties with which they are invested. Clearly the reason for the principle laid down is independent of the nationality of the official. Nay more, it is quite possible that, in certain cases, an international official engaged on the business of the League be in greater need of diplomatic protection as against the courts of his own country than as against those of any other State. Needless, however, to press that point here.

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[1] See *Macartney* v. *Garbutt* (L.R. 24 Q.B.D. 368) and Dalloz' *Répertoire de Législation*, t. 1er, p. 275, s. 17, referred to by the Secretary-General in a letter of June 11, 1925, to the head of the Federal Political Department at Berne, where he observes that " . . . Both the English and the French Courts have recognized that a person who, with its consent, is accredited to the government of the State of which he is a national as the diplomatic representative of a foreign Power, is entitled to the same measure of diplomatic privilege as if he were a foreigner." *League of Nations*, Pub. C. 66, 1926, v, p. 11.

It has been argued again and again that the grant of immunity from jurisdiction to one engaged on a diplomatic mission in his own country amounts to a complete denial of justice, as there remain no other courts of law before which he may be brought. But this argument does not stand impartial analysis when it is contrasted with facts. In Geneva, for example, Swiss citizens employed by the League organizations enjoy diplomatic immunities, but they are not for that reason exempt from the jurisdiction of all courts of law. Their immunities are waived, when circumstances so require, by the competent authorities, that is, by the authorities which nominate these officials. The latter then become subject to the jurisdiction of the local courts.

It is interesting to note that there has never yet been a case where this method of procedure did not prove satisfactory, and it is just as applicable in cases where officials of the League are sent on mission to their respective countries. There could only be a denial of justice if the competent authorities, that is to say, the Secretary-General of the League of Nations in the case of the Secretariat of the League and the Director of the International Labour Office in the case of the latter organization, categorically refused to waive the immunities of a member of their staff. But such a circumstance is surely too remote and improbable to be taken into account. International institutions, like individual States, have the greatest interest in entertaining the most amicable relations with all States, and these have undoubtedly more accessible means of making their complaints heard as against an international organization than as against a particular State. Furthermore, " . . . the League would certainly not wish to retain the services of an official if the government of the country in which he was employed put forward any justifiable objections . . . to the manner in which he was making use of the diplomatic privileges granted him." [1]

The grant of diplomatic immunities to officials of the League when in their own country was fully discussed by eminent members of the Institute of International Law at its Thirty-first Session in Vienna, August 1924.[2] While space does not permit to review the learned arguments adduced by advocates of two opposed schools of thought (which may be called the " traditional " and the " modern " schools), it is specially agreeable to draw attention to the conclusion they finally recorded in Resolution No. 11, the first part of which reads as follows :

" *Dans l'application du traitement prévu ci-dessus, les membres de la Société des Nations ne sont autorisés à faire aucune distinction entre leurs ressortissants et ceux des autres Etats.*" [3]

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[1] *League of Nations*, Pub. C. 66, 1926, v, p. 11.

[2] *Institut de Droit international, Annuaire*, 1924, t. xxxi, p. 115.

[3] *Ibid.*, p. 179.

The Advisory Committee of Jurists appointed to prepare a draft scheme for the establishment of the Permanent Court of International Justice, mentioned in Art. 14 of the Covenant of the League of Nations, had recommended that "The members of the Court, *when outside their own country*, shall enjoy the privileges and immunities of diplomatic representatives." This formula, Art. 19 of the draft, was the subject of considerable discussion in the Assembly Sub-Committee.[1] There Sir Cecil Hurst, representing the British Empire, proposed by way of amendment to omit the words "when outside their own country."[2] In explaining this amendment he said that "the British Government did not think it reasonable that a judge belonging to the country in which the Court had its seat should not enjoy diplomatic privileges." He observed that "the same question arose concerning the permanent Secretariat of the League and expressed the opinion that the time had come to abandon the old diplomatic rule, according to which a person enjoys diplomatic privileges only outside his own country."[3] Mr. Huber, the representative of Switzerland, insisted that the original text be maintained. "The extension of diplomatic privileges," he said, "would lead to inadmissible results which the Swiss government were not prepared to accept as concerns the permanent Secretariat. Persons enjoying, for instance, the right of voting in Switzerland could not be exempted from the application not merely of criminal legislation, but also of rules concerning taxes and military service. Steps would, of course, be taken to protect their professional secrets, but a clear distinction must be drawn between their official situation as officers of the League and their personal legal status."[4] As a subtle compromise between these conflicting views the Sub-Committee finally agreed upon a formula corresponding to the wording of Art. 7 of the Covenant,[5] subject, however, to the understanding "that the situation of judges in their own countries should not be prejudiced by the solution adopted."[6] This reservation was intended to reassure those who feared too great an extension of diplomatic privileges. There is, however, no likelihood that it will have any effect in practice, since it was not included in the final text of Art. 19 of the Statute of the Court which stipulates that: "The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities."[7]

The ultimate result of the discussion, therefore, has been to replace the words "when outside their own country" by the words "when engaged on the business of the Court," the latter being analogous to the terms "when engaged on the business of the League" as found in Art. 7, para. 4, of the Covenant. These forms of expression, it would seem, should convey the same idea as to what rule should govern the diplomatic prerogatives of the international officials concerned, notwithstanding the reservation that had been made by the Sub-Committee in discussing Art. 19 of the Statute of the Court. Fortunately this is the view which has been followed to this day. The correlative significance of the above formulæ has always been present in the minds of those who had to interpret them, and the principle comprised therein has been applied by various States to their nationals.

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[1] *Records of First Assembly, Proceedings of Committees*, pp. 256–8.

[2] *Ibid.*, p. 592.

[3] *Ibid.*, p. 356.

[4] *Ibid.*, p. 356.

[5] *Ibid.*, p. 358.

[6] *Ibid.*, p. 529.

[7] *Records of First Assembly, Plenary Meetings*, p. 471.

The latter, however, appear to have been considered as "engaged on the business" of the institution they represent in those cases only where they can be said to act in their official capacity and within the limits of their powers, whereas those who are not nationals of the State where they exercise their functions have enjoyed immunity from jurisdiction even for acts performed in their private capacity. The *modus vivendi* concluded in 1926 between the Federal Government of Switzerland and the League organizations at Geneva defines the extent of the privileges accorded to members of the staff of Swiss nationality thus:

> 1. Officials of Swiss nationality may not be sued before the local courts *in respect of acts performed by them in their official capacity and within the limits of their official duties.*
>
> 2. The salaries paid to them by the League of Nations are exempted from cantonal and municipal direct taxes.[1]

And on May 22, 1928, the Netherlands Minister of Foreign Affairs communicated to the President of the Permanent Court of International Justice a document containing the "General Principles" and "Rules of Application" which are to govern the relations between the Netherlands authorities and the members and staff of the Permanent Court. It is there stated that the members of the Court shall enjoy the same diplomatic privileges and immunities as are in general accorded to heads of missions accredited to Her Majesty the Queen of the Netherlands. But Art. II, para. 3, of the above-mentioned Rules limits the application of this principle to the members and the Registrar of the Court of Netherlands nationality in the following terms:

> The members and Registrar of the Court will not be answerable in the local courts *for acts done by them in their official capacity and within the limits of their powers.* The salaries paid to them out of the budget of the Court will be exempt from direct taxes.[2]

And para. 3 of Art. III which concerns the Deputy Registrar and officials of the Court of Netherlands nationality provides that:

> Higher officials will not be answerable in the local courts *for acts done by them in their official capacity and within the limits of their powers.* The salaries paid to them out of the budget of the Court will be exempt from direct taxes.[3]

The reservations thus made in regard to nationals of the country where official duties are to be discharged appear to have been necessary to meet certain difficulties which might otherwise have arisen in the administration of municipal affairs in these countries, and also to allay the fears of those who opposed what they considered to be too great a departure from former diplomatic practice.

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[1] *League of Nations Official Journal, 7th Year*, 1926, p. 1423.

[2] *Ibid., 9th Year*, 1928, p. 985.

[3] *Ibid., 9th Year*, 1928, p. 986.

Albeit these restrictions do not impair the significance of the rule that in these matters the nationality of a diplomatic representative is subordinate to his official function.[1] Certain details of application may require a special adjustment in different circumstances, but the general principle shall nevertheless prevail. It is even recognized in practice by the countries where the International Labour Office has permanent representatives although no special agreement has been made between such countries and the Labour Office. Thus in London, Rome, Berlin, Tokio, New Delhi, and even in Washington, officials of the permanent offices of the International Labour Organization enjoy diplomatic privileges irrespective of the fact that they are in a large majority nationals of the countries where these offices are established.

Recognition of the principle was evidently brought about by the force of circumstances. For example, none of these countries, no more than Switzerland nor the Netherlands, would be justified in taxing the salaries of international officials who are remunerated out of the funds of the general budget of the League. Surely, no State should take advantage of the fact that such officials exercise their functions within its territorial jurisdiction in order to recover indirectly through fiscal measures a portion of the contributions which it is called upon to make to a common budget.

It is interesting to note that this principle of fiscal immunity has met with approval in the United States of America, although that country is not a member of the organization. While the circumstance is only of relative importance, it concurs with other facts in marking the stage in the development of international law where the useless fiction of exterritoriality as the basis of diplomatic immunities may be considered as definitively discarded. The truth is that no representative of an international institution could be the subject of diplomatic immunities if these were to rest on the fiction of exterritoriality. The latter was based on the supposition that diplomatic agents, notwithstanding their residence abroad, remained subject to the territorial jurisdiction of the State to which they belonged. The buildings and land where they exercised their duties were supposed to form part of the territory of their own country, and for that reason they were exempt from the jurisdiction of the courts of the State to which they were accredited. It is evident that on such grounds they remained liable to the local courts when they were accredited to their own country, and consequently enjoyed no diplomatic privileges whatsoever.

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[1] Fauchille, *Traité de Droit international public*, t. 1er, 3ème partie, p. 62. Hall, *International Law*, p. 354, note 1.

But no representative of an international institution may be deemed to be subject to the territorial jurisdiction of the organization which appoints him, since international institutions do not, like States, possess this territorial jurisdiction. It is necessary to bear in mind that members of the staff of the Secretariat of the League or of the International Labour Office are appointed by these respective institutions and not by the different States where these officials are recruited. Moreover, while the League of Nations and the International Labour Office are persons in international law and may own land on which to erect dwellings for the purpose of housing their staff and keeping their documents, such ownership does not imply any kind of territorial jurisdiction over the members of the staff. Nor can it be imagined by any process of fictitious reasoning that such land and buildings form part of the territory of the various States wherefrom officials have been selected. The only territorial jurisdiction to which these officials are subject when engaged on the business of either of these institutions is that of the country where they discharge their duties, provided their immunities have been previously waived by the competent authority. The fiction of exterritoriality, therefore, cannot apply to such cases and must not be invoked to justify a discrimination as between officials who are and those who are not nationals of the country where they perform their duties.

If the picturesque expression " exterritoriality " is to be further used in reference to diplomatic privileges it must be taken to signify that a diplomatic agent is entitled to these privileges, not because he is subject to the jurisdiction of a State other than the one where he exercises his duties, but because they are attached to the functions with which he is invested. In this sense, the term may be applied to a diplomatic agent exercising diplomatic functions in his own country on behalf of an international institution or of another State.

With the progress of time the general principle of international law here expounded will doubtless be given a wider field of application. It is not unreasonable to expect that those States which feared there should exist a complete denial of justice where the rule applied to an ordinary diplomatic agent in his own country will soon accept the view that, by analogy to the case of international officials, the immunities accorded to an ordinary diplomatic representative could be waived by the accrediting State at the request of a complainant or of the government of the State to which he is accredited, regardless of the fact that he is a subject or citizen of the latter. Also, as the legal personality of international institutions asserts itself, the diplomatic character of their representatives will become more universally recognized by States which are not members thereof. The result will be a greater uniformity in the application of the principles governing diplomatic immunities, and thus will be lessened the task of the jurists entrusted with the codification of this branch of the law of nations.

BIBLIOGRAPHY OF THE ENGLISH LAW OF PROPERTY, WITH SPECIAL REFERENCE TO THE PROPERTY LEGISLATION FROM 1922 TO 1927.[1]

SECTION I.

Historical.—THE development of Real Property Law, with special reference to the period before 1896. The first step of any student seeking an acquaintance with the development of real property law during this period should be a perusal of Professor W. S. Holdsworth's *Historical Introduction to the Land Law*. This work is not documented in detail, but gives an excellent summary of the development of the law to 1927. More detail can be obtained from the same author's *History of English Law* (9 vols.), which contains what is probably the most complete account of the development of English property law. Volumes III, V and VII are of special value in connexion with this subject. Reference should also be made to Digby's *History of Real Property* (5th ed., 1897). This work traces the history of the subject to the date of its publication. The treatment of the law after the mediæval period is rather slight; but for the earlier period the work is invaluable and contains considerable extracts from contemporary sources. The starting-point for nearly all research into the early history of English Law is the *History of English Law*, by Pollock and Maitland (2nd ed., 1898, 2 vols.). This work, however, merely makes excursions into the period after 1270. A popular and very lucid account of the development of English Property Law is contained in Sir F. Pollock's little work *The Land Laws* (1897). More summary accounts of the history of the subject will be found in Jenks's *Short History of English Law* (2nd ed., 1920); White's *History of English and American Law*; and Potter's *Introduction to English Legal History* (2nd ed., 1926). *Possession in the Common Law*, by Pollock and Wright (1888), is a short essay of outstanding merit. Jenks's *Modern Land Law* (1899) is excellent for those who seek a short and clear account of how historical causes influenced the substance of later law. There is good material in Ghosh's *History of Land Tenure in England* (1929).

Of contemporary accounts of the state of the law at different dates space and also the scope of this bibliography forbid anything more than an indication of the chief works. A useful starting-point is furnished by Brunner, *Sources of English Law*, and by Maitland, *Materials for English Legal History* (both in *Select Essays in Anglo-American Legal History*, vol. ii, pp. 1–95). Littleton on *Tenures* (about 1481) is the first real attempt at a comprehensive statement of the law of real property. It is written in law French and forms the basis of Coke on *Littleton*. The latter was first published in 1628 and contains a translation of and a full commentary upon Littleton's work. It forms an excellent starting-point for a study of mediæval contemporary sources. The nineteenth edition published in 1832 contains useful notes bringing much of the law to 1832. A useful and sound authority is Perkins' *Profitable Book*, written in law French and published in 1530. A fifteenth edition was published in English in 1827. Useful again are Rolle's *Abridgement* and Viner's *Abridgement* (1791–4). Both works contain valuable detail; but each arranges its subject-matter under alphabetical headings, and neither makes much attempt at scientific exposition. Viner provides a ready and valuable means of collecting all authorities to the date of its publication.

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[1] The title of this bibliography sufficiently explains its object, and with that object in view those responsible for its compilation have made no attempt to incorporate in Section I much more than the chief contributions that will give the right direction to the student in search of details.

One of the most lucid general statements of the law is found in Blackstone's *Commentaries*, first published in 1765. Its exposition of contemporary law is more valuable than its historical matter. A fifteenth edition by Christian brings the law down to a date just before the amending statutes of the nineteenth century. A little-known but valuable work is Burton's *Cases and Opinions of Eminent Counsel in Law, Equity and Conveyancing* (1791). Its title sufficiently indicates its scope. Valuable information can be obtained from Cruise's *Digest* (4th ed., 1835). Burton's *Compendium of the Law of Real Property* (1st ed., 1828–4th ed., 1837) contains a painstaking though somewhat dull survey of the subject, but is useful because it has editions published both before and after the changes of 1833. Of value for the same reason is Hobler's *Familiar Exercises between an Attorney and his Articled Clerk* (1st ed., 1831; 2nd ed., 1837). The two editions, which contain elementary discussions of a more or less practical character, indicate the main changes made in 1833. An accurate elementary exposition is contained in Hayes' Introduction to *Real Property and Conveyancing* (1834). Lord St. Leonard's *Law of Real Property* is an excellent outline written in the form of letters.

The Law of Real Property, by Joshua Williams, is a classic which was first published in 1845 and has since run through twenty-four editions. Thirteen editions, bringing the law to 1880, were prepared by the author himself, and his son, T. Cyprian Williams, produced subsequent editions until the work passed into other hands in 1925. Successive editions of this work afford a most valuable means of ascertaining the law at various dates and of estimating the effect of statutory changes. For the same purpose resort may be made with distinct profit to the successive editions of Goodeve's *Law of Real Property*, the first edition of which appeared in 1883. Equally valuable will be found the successive editions of Stephen's *Commentaries on the Law of England.* This work, the primary object of which is the instruction of beginners in the main branches of English law, was partly founded on Blackstone. It made its first appearance in the years 1841–5; and in its progress through many editions it has lost some of its earlier characteristics. Its value for its primary purpose nowadays is questioned in some quarters; but there can be no doubt that anyone who wishes to trace in broad outline the development of the law of property during the period which its successive editors cover will derive considerable assistance from it.

Mention may be made also of Flintoff's *Law of Real Property with the Statutes relating thereto* (1839–40) and Smith's *Compendium of the Law of Real and Personal Property* (1st ed., 1855–6th ed., 1884). Neither is a classic, but both works had their readers in their time; of the two Smith is perhaps the better. Challis's *Law of Real Property* (1st ed., 1885–3rd ed., 1911), is a work which was considered an essential part of the equipment of any serious law student of a former generation. It makes rather dull reading but contains a wealth of learning. A valuable *Collection of Cases and Statutes on Real Property Law* was published by the Society of Public Teachers of Law in 1923.

On the more practical side of the subject William West's *Symbolæographia* (1590) throws invaluable light on conveyancing practice at the end of the sixteenth century. Sheppard's *Touchstone of Common Assurances*, a seventeenth-century text-book, is of great value. It was edited and brought up to date by Preston in 1820. Preston on *Abstracts of Title* (2nd ed., 1823), and two other works by the same author—namely, *Conveyancing* (3rd ed., 1819–21) and *Estates* (2nd ed., 1820–7)—constitute standard authorities on the situation immediately prior to 1833, and, indeed, for those branches of the law which have remained unchanged they are sometimes consulted in present-day practice.

Of later works devoted to conveyancing the scope of this section excludes the more detailed. Watkins's *Principles of Conveyancing*, which reached its eighth edition in 1833, is useful. So also are Clayton's *Elements of Conveyancing* (1855) and Greenwood's *Manual of the Practice of Conveyancing* (1st ed., 1856–9th ed., 1897). A little-known but useful work is Coventry's *Conveyancer's Evidence* (1832). But to the average investigator the maximum value will be obtained from Elphinstone's *Introduction to Conveyancing* (1st ed., 1871–7th ed., 1918). This was regarded deservedly as the best work for several generations of students. It was written by an author who on account of a rare combination of learning with practical experience was exceptionally well qualified to lead the student from theory to practice; and in subsequent editions it did not lose, as good books sometimes do, its original merits.

Few modern historians of English law make much use of collections of precedents. It is submitted that such works, in the hands of persons properly qualified by training and experience, might yield useful results. It may be mentioned that an invaluable guide to the library of precedents is to be found in Copinger's *Index to Precedents in Conveyancing and to Common and Commercial Forms* (1872), a work which refers to more than 10,000 precedents and their whereabouts. There have also been brought to the notice of the editors of this bibliography the catalogues of several law libraries which contain useful lists. Perhaps the best is that issued by the Manchester Incorporated Law Library Society in 1911, which contains a most valuable classified list of precedents with the dates of their issue. It is not suggested that Copinger's Index or the Manchester list is complete, but both constitute helpful guides and have a comprehensive range.

To works on special subjects the student who has used seriously the authorities already indicated will have been introduced in the course of his reading. It is sufficient, therefore, to indicate here the most outstanding. Bacon's *Reading on the Statute of Uses* (ed. by Rowe, 1806) gives the clearest and most scientific account of the application of this statute. Sanders on *Uses and Trusts* (5th ed., 1844) is a standard authority. Underhill's *Trusts and Trustees* is an excellent and clearly written work the first edition of which was published in 1878. Subsequent editions issued at intervals cover the period up to the present time; whilst Lewin's *Law of Trusts* appeared in thirteen editions between 1837 and 1928, and is a recognized authority. Godefroi's *Law Relating to Trusts and Trustees* first appeared in 1879, and a fifth edition was published in 1926. It is essentially a practitioner's work and is particularly valuable in matters of detail. An exhaustive account of the law relating to settlements is given in Vaizey's *Treatise on Settlements* (1887); whilst *The Settlement of Real Estates*, by Joshua Williams, (1878), will well repay perusal. It was written by one whose scholarship, in his own field, had few rivals, and who in addition was one of the leading practitioners of his generation. Of recognized value is Fearne on *Contingent Remainders*. The last edition is Butler's (10th ed. 1844); it contains valuable notes, and there is also attached Smith on *Executory Interests*. The most authoritative modern work on the history of future estates is Gray's *Rule against Perpetuities* (3rd ed., 1915). Withers' *Investigation of Title to Reversions* (1910) is not well known to the academic student, but it will be found useful by those who wish to see how historical causes conditioned actual practice. Mention should also be made of two outstanding works by Sugden (afterwards Lord St. Leonards), namely, *Powers* (8th ed., 1861) and *Vendors and Purchasers* (14th ed., 1862). Of recognized merit again is Farwell's *Treatise on Powers* (1st ed., 1874–3rd ed., 1916). Jarman's *Treatise on Wills* is a reliable authority; it first appeared in 1844, and a seventh edition was published in 1930. Detailed and accurate information on the same subject can be obtained from Theobald's *Law of Wills*, the eight editions of which cover the period from 1876 to 1927. William's *Law of Executors and Administrators* gives a very complete and accurate account of its subject-matter; its twelve editions are spread over the period from 1832 to 1930. Chief rents, or rent charges, form a subject which has given a special local atmosphere to conveyancing practice in some districts. Those who desire to supplement on this point the information given in the general text-books will profit by a perusal of *The Law of Rentcharge*, by J. M. Easton (1909, with supplement 1911). Useful detail on the subject of easements can be gathered from Gale's *Law of Easements* (1st ed., 1839–10th ed., 1925), Goddard's *Law of Easements* (1st ed., 1871–8th ed., 1922), and Innes's *Digest of the Law of Easements* (1st ed., 1878–8th ed., 1911). The literature dealing with copyholds is extensive. The most valuable modern account of its origin is contained in Vinogradoff's truly learned *Villeinage in England*; Seebohm's *English Village Communities* is also a standard authority. Williams on *Commons* (1880) deals with the early history of the same subject. An introduction to original sources can be obtained through the medium of Maitland's *Domesday Book and Beyond* and Stubbs's *Select Charters*. Coke's *Compleate Copyholder* (1630) has been truly described as a work " of first-class importance." Works on the later law relating to copyholds can be obtained in any law library. Useful material on the subject of gavelkind is to be found in Robinson's *Common Law of Kent* (1st ed., 1741–5th ed., 1897). This work also contains an interesting appendix dealing with the custom of Borough-English. For gavelkind C. J. Elton's *Tenures of Kent* (1867) also is valuable; and Blount's *Ancient Tenures of Land* may be consulted with advantage. Reliable and detailed information on the subject of mortgages will be found in Fisher's *Law of Mortgages* (which was first published in 1860) and Coote's *Treatise on the Law of Mortgages*, which first appeared in 1823. Both have been revised from time to time by competent editors, and both are treated by the profession to-day as standard authorities.

The volume of legislation during the nineteenth century resulted in the publication of many commentaries on, and annotated editions of, various statutes. Some of these, in revised form, are still in use by practitioners; but of those which have an historical value it may be convenient to indicate a few. Marcy's *Epitome of Conveyancing Statutes* (1st ed., 1873–5th ed., 1893) contains work of much interest and practical value. It covers the period from 13 Edward 1 to the end of 55 and 56 Victoria. It was written mainly for the conveyancer, and deals with a vast number of statutes. The work of summarization is accomplished with skill and accuracy. Another work of the same nature, although it does not cover so wide a range, is Browell's *Real Property Statutes* (1846). It deals with a large number of statutes passed in the reign of William IV and Victoria. Of similar scope, but rather better known, is Shelford's *Real Property Statutes*. This work, which is rich in learning, was first published in 1833 and afterwards passed through many editions. It was continued, under the name of Carson and Bompas, *Real Property Statutes*, the first edition of which appeared in 1902. Sugden's *Real Property Statutes* (2nd ed., 1862) contains an invaluable commentary by one who, on account of a combination of ability and experience, was exceptionally qualified. An excellent exposition is contained in Langley's *Reading of the Law of Property Act* (1860), and there is good work in Rogers' *Practical Essay on the Changes of the Law effected by Lord St. Leonard's Act* (1860). The Real Property Acts, 1874, 1875 and 1876 were edited by Sir W. T. Charley in 1876. Greenwood's *Recent Real Property Statutes* (1878) covers much the same ground. The group of statutes of which the Conveyancing Acts 1881 and 1882 are the chief found numerous commentators. The best work for the average investigator is Underhill's *Concise Exposition of the New Conveyancing Acts*, 1881–82. From it the reader can obtain within a reasonable compass a contemporary account of the purpose as well as the provisions of the legislation dealt with. A meritorious work of the same nature was published by Wolstenholme and Turner. This covers the Vendor and Purchaser Act, 1881. It contains a valuable preface dealing with the history of the legislation, particularly as it affected the legal profession. There are also useful notes, together with forms and precedents for use under the Acts. The work went through several editions, and in a modified form it still exists as Wolstenholme's *Conveyancing and Settled Land Acts*, the tenth edition of which appeared in 1913. A short history of the Act of 1881 is contained in the preface to Clerke and Brett's *Conveyancing and Law of Property Act*, 1881. The same writers produced a similar work on the Act of 1882. White's *Conveyancing and Law of Property Acts*, which appeared in 1883, is a shorter work with notes and precedents; and also worthy of attention are Hewitt's *Exposition of the Conveyancing and Law of Property Act*, 1881, and Lynch's *Conveyancing Acts*, 1881 *and* 1882. Williams' *Conveyancing Statutes* (1884) is a standard authority. It states rules of court, and contains notes and precedents. Equally numerous are works dealing with the nineteenth-century legislation on the subject of settled land. The Settled Estates Act, 1877, found a worthy commentator in Middleton (1st ed., 1878–3rd ed., 1882). Deservedly the best-known work is Underhill's *Settled Land Act*, first published in 1884. Challis, *Settled Land Act*, 1882, contains much learning, particularly on the subject of entailed interests. Useful precedents as well as excellent notes, both critical and expository, will be found in Clerke and Brett's *Settled Land Act*, 1882. Robbins' *Settled Land Statutes*, 1882, is not always reliable in matters of detail; but there are useful short notes and precedents in Dodd's *Settled Land Act*, 1882, and the same author's *Settled Land Act*, 1884, *Explained* deals clearly and concisely with its subject-matter. Detailed study of the legislation dealing with trustees may usefully commence with Horsey's *Practical Analysis of the Trustee Act*, 1850; for although this small work is comparatively unambitious in character, its author does his work with accuracy. Worthy of perusal for the same reason is Ince's *Systematic Arrangements of the Trustee Act*, 1850 (1st ed. 1852–2nd ed. 1858). Useful introductory matter and explanatory notes are contained in

Headlam's *Trustee Act*, 1850. A second edition published in 1852 contained statutory amendments. There is useful expository matter in Roger Walters' *Practical Speeches on the Statutes for the Amendment of the Law of Property and Relief of Trustees* (1862); and there are notes in Hunter's *Property Amendment and Relief of Trustees Act* (1860). Lord Cranworth's Act is expounded in Langley's *Reading of the Act* 23 *and* 24 *Victoria chapter* 145. Hamilton's *Trustee Act*, 1850, is a work of moderate value, to which a supplement was issued in 1890. Later legislation can best be studied in Rudall and Greig's *Law of Trusts and Trustees.* This work consists of accurate and detailed annotations of the Statutes. First issued in 1893, it was a development of the author's earlier edition of the Act of 1888. A fourth edition issued in 1911 contains the relevant legislation up to and including the Public Trustee Act, 1906. The successive editions are valuable to anyone wishing to trace statutory progress in detail. A useful annotation of the Act of 1893 was published by Campernowne and Johnston in 1904. The statutes dealing with married women's property have attracted a host of commentators, but the work of some of them is by no means reliable. The best short introduction to the subject will be found in the late Professor C. S. Kenny's Yorke Prize Essay, *The Law of England on the Effects of Marriage on Property and the Wife's Legal Capacity* (1879). For a general historical sketch resort may be had to Lawrence, *History of the Laws affecting the Property of Married Women* (1884), but the reader would be well advised to treat with critical caution some of the detailed interpretations in this book. Of annotated editions of the Acts two useful ones are Conybeare and Andrews, *The Married Women's Property Acts*, 1870 *to* 1882 (2nd ed., 1883), and Griffith's *Married Women's Property Acts*, 1870 *to* 1884, (6th ed., 1891). The general effect of the Act of 1882 is well summarized in Thicknesse, *Law of Husband and Wife: a Digest as affected by the Married Women's Property Act*, 1882 (1884). Useful contemporary annotated editions of the Act of 1882 were published by Macmorran (1882), by Rubinstein and Ward (1882), by Mozley (1883), by White and Blackburn (1883) and by Smith (1884).

A short annotated account of American and foreign contributions to the literature of real property law is contained in Holdsworth's *Historians of Anglo-American Law* (1928), pp. 106–10.

SECTION II.

Projects for Reform.—He who seeks for information on the subject of this section will find that material is not easy to discover because it is so widely scattered. The fact is that some of the best paragraphs suggesting reforms are to be found not in volumes devoted expressly to change but in text-books the primary object of which was to expound the existing law of property or the art of conveyancing. For instance, the early editions of Williams' *On Real Property* contain many such paragraphs, and most of the suggestions contained in them have since been translated into legislation. Readers of many of the works mentioned in the first section of this bibliography will have encountered other instances. Even volumes of conveyancing precedents are often useful in the same way, for it is a not infrequent experience for the searcher among them to find a note which throws illumination on contemporary opinion as to contemplated changes. Speeches made by lawyers on formal occasions are again a fruitful source for the investigator in this field. In The Law Society's Library at their Hall in Chancery Lane, for instance, there are preserved numerous speeches made by former Presidents of that Society, and from them there is much to be learned about the movements which have led to reform. In the same way the legal press of past days forms a profitable field for the investigator, for it contains many occasional paragraphs which, although short in themselves, are often informing as to the trend of progress and development. Fortunately for the form which the law has taken, but unfortunately for the student who hopes for a short cut to his materials, English property law has developed, not as the result of any preconceived philosophical theory, but mainly as the result of difficulties encountered by lawyers in the practice of their profession and the suggestions which they have made for the removal of those difficulties. So it comes about that he who would produce a complete history of the reform of the English land laws will have to seek his materials in all those places in which lawyers have been accustomed to express their views. This bibliography makes no attempt at a complete and detailed tabulation of all such sources. Such an attempt would take as much time and its results would need almost as much space as a fair-sized volume. The utmost that can be done here is to indicate such materials as will assist the student fairly on his way.

Of the several possible starting-points probably none is better than a lecture delivered by Sir W. S. Holdsworth at the University of Birmingham in 1926, and subsequently published in the *Law Quarterly Review* (vol. xlii) under the title of *The Reform of the Land Law ; an Historical Retrospect.* This gives clearly and in short compass a general review of the reform movement. Its substance is now incorporated in Chapter IV of the same author's *Historical Introduction to the Land Laws.* A very useful essay on the subject of its title is J. R. de Villiers' *History of Legislation concerning Real and Personal Property in England during the Reign of Queen Victoria* (1901). In *A Century of Law Reform* (1901) there is an essay by Sir A. Underhill on *Changes in the English Law of Real Property during the Nineteenth Century.* This gives a very succinct account with some details of the changes which took place during the century.

From the above works the student will tend to turn to the four Reports, issued between 1829 and 1833, by the Commissioners on the Law of Real Property. It is useful to note, however, that there are other sources of information of the same period. Much contemporary discussion was provoked by J. Humphreys' *Observations on the Natural*

State of the English Laws of Real Property, with Outlines of a Code (1826). A reply to Humphreys was written by E. B. Sugden under the title of *A Letter to J. Humphreys on his Proposal to Repeal the Laws of Real Property and Substitute a Code.* Other works dealing with the proposal include S. S. Hunter's *Observations on the Code for Real Property proposed by J. Humphreys*; an anonymous work entitled *Remarks on the Expediency of Framing a New Code Relating to Real Property*; and J. J. Park's *Contreproject to the Humphreysian Code.* In 1821 in the *Edinburgh Review* (vol. xxxv, pp. 190–213) there appeared an interesting article on *English Conveyancing.*

The reports of the commissioners, however, form the basis of most discussion of reform during the nineteenth century. They were based on the evidence of many of the leading property lawyers and conveyancers of the day and, apart from the reforms which they suggested, they have a value in the concise statements which they contain of existing principles of law and the practice of conveyancing. As regards reform the reports were conservative in character, and they did not advocate any far-reaching changes in substantive law. In the *Law Magazine* (1829: vol. 2, p. 597) there is a useful review of the Report of 1829. The review commences with an interesting preliminary sketch of the history of English conveyancing. The student who desires to estimate the condition of public opinion under which the Reports were produced would do well to consult Dicey's *Law and Public Opinion in England during the Nineteenth Century.*

The chief reform advocated by the Commissioners was the establishment of a general register of conveyances. One of the best historical accounts of this idea will be found in the excellent communication made to the Commissioners themselves by John Tyrrell. There is an unpublished copy of Tyrrell's suggestions with minutes of the evidence in the Middle Temple Library. A Bill for setting up the registry advocated by the Commissioners was prepared, but it was ultimately dropped. There is a good analysis of the Bill in *The Legal Observer* (vol. 7, p. 436). The proposal provoked much discussion. Noteworthy among the first works on the subject was Dugmore's *Suggestions for the Registration of Title Deeds, etc.* (1833). This work contained some original suggestions of the author's own. Dart's *Suggestions for a General Registry* (1844) is one of the best works on the subject. A critic of the proposal was Sir E. Sugden, whose *Cursory Remarks on a General Register* had much influence. The same author's *Shall we Register Our Deeds?* (1882) contains an interesting reply to the advocates of registration. Periodical literature of the period contains many references to the subject of a register, most of them of an appreciative nature.

Some of the early articles in the *Law Review* will well repay the attention of the student. In volume 1 (1845) at p. 382 under the heading *Conveyancing, its Early History and Present State* there is a review of the first edition of Williams on *Real Property* and of the first edition of Davidson's *Concise Precedents in Conveyancing.* The review, which is of an extensive character, is influenced by prevailing discussions. It takes the form of a general historical article with full and informing annotations. At p. 114 of volume 2 of the same periodical (1845) there is a memoir of Charles Butler to which is appended a print of Butler's suggestions for simplifying the transfer of real property, prepared for Sir John Singleton (Lord Lyndhurst) in 1827 and forwarded by the latter to Sir Robert Peel. In these suggestions there is an anticipation of the Settled Land legislation. In the same volume, at p. 405, there is an article on conveyancing reform. It contains a notice of Lord Brougham's speech on Law Reform, discusses the Real Property Statutes of 1845 and analyses a report published by the Society for Promoting the Amendment of the Law. The report in question contained suggestions for shortening legal instruments. A student who examines the transactions of the last-named Society will not find his efforts profitless. Charles Butler's *Reminiscences* also contain valuable material for this period.

In 1850 H. T. Frend published *Outlines of a Plan for Insuring the Stability and Reducing the Expense of Investigating Titles to Landed Property.* In Parliamentary Papers, 1852–3, vol. xxxvi, there is a report of a Committee which suggested the registration of legal titles in preference to the registration of conveyances. In 1859 the Commissioners on the Registration of Title issued their Report (Parl. Pap., 1859, Sess. 2, vol. xxi). The Report dealt with the question of security of legal titles. It outlined a scheme of such registration. It also anticipated some of the legislation of 1925. Much discussion followed this Report. The best of it will be found in the Juridical Society's Papers, which contain contributions by some of the leading property lawyers of the day, notably Joshua Williams, E. P. Wolstenholme and George Sweet. Volume 2 of the Papers is probably the most valuable. Some of these papers show the growth of the view that reform depended more on the substance of real property law than on the machinery of Conveyancing. Note in particular the paper by Joshua Williams on *The True Remedies for the Evils which affect the Transfer of Land* (vol. ii, p. 589). This paper was separately printed in 1863. There are some shrewd comments in the same author's *Letters to John Bull Esquire on Lawyers and Law Reform* (1857). There is also some interesting discussion in the *Law Amendment Journal* (1855–7). Note should also be made of E. N. Ayrton's *Suggestions for an Act to give an Indefeasible Title to Land* (1857), and S. J. Hunter's *Observations on Real Property Law Reform* (1860).

Lord Westbury's Act, 1862, provided for the voluntary registration of title and provoked much discussion, some of the best of which again is to be found in the Juridical Society's Papers. E. N. Ayrton's *Treatise on the Land Transfer Act* (1863) is expository rather than critical, as also is Bruce's *Guide to the Land Registry Act* (1863). There is clear exposition in Smith's *Elementary Review of the Practice of Conveyancing* (1863), in Urlin and Key's *The Transfer of Land Act* (1863), and in Gough's

Land Registry Manual (1862). Critical comment is to be found in Sugden's *Observations on the Land Transfer Bill* (1870), and the eighth edition (1869) of the same author's *Handy Book on Property Law* contains passing references to problems of amendment. Mention may also be made of J. H. Humphreys' *Registration of Assurances Bill, its peculiar system and practical consequences considered.* Sheldon Amos' *An English Code* (1873) contains some references to real property law. Registration of title was defended by Tenison Edwards who in *Shall we Register Title?* (1863) summarized the chief objections to registration and attempted to refute them. In the same year Robert Wilson published *Registration of Title to Land, what it is, why it is needed, and how it may be effected.*

Lord Cairns' Act superseded that of Lord Westbury in 1875, but retained the voluntary system. A convenient exposition will be found in Holt's *Land Transfer Act*, 1875, and in the *Land Transfer Acts*, 1875 *and* 1897, by Rubinstein and Nash (1898). Holt also published in 1876 a *Handy Book on the Registration of Title.* There were numerous other works of the same nature. Lord Thring's *Simplification of the Law; Practical Suggestions* (1875) is of doubtful value. The Juridical Society's Papers again contain some of the most weighty criticism of this measure. There were many who held that successful reform would come only as the result of change in substantive law. In the preface to the first edition of Digby's *History of the Law of Real Property* (1875) there is a discussion of the view that the complexity of conveyancing is due to the Statute of Uses. This same view was taken by the Commissioners who reported in 1878. Their Report (Parliamentary Papers, 1878–9, vol. xi) made several suggestions for reform of substantive law, and several recent changes can be traced to them.

From this point contemporary discussion treats of more diverse topics. Maitland's paper on *The Law of Real Property*, written in 1879 (*Collected Papers*, vol. i), influenced opinion particularly by its attack on primogeniture. There is useful material in W. D. Jean's *Observations on and Suggested Form of an Act for the Amendment and Simplification of the Law of Real Property* (1879). G. C. Broadrick's *English Land and English Landholders* (1881) deals with social as well as legal aspects of the problem; this work is fully annotated, and was published by the Cobden Club, which had already published (1870) under the title of *Systems of Land Tenure* a useful series of independent essays on various national systems of land law. There is interesting material on the subject of primogeniture in Lloyd's *Succession Laws of Christian Countries* (1877) and in the Yorke Prize Essays of C. S. Kenny and P. M. Laurence (1878). Hayes' *Free Trade in Land* (1878) and Kay's *Free Trade in Land* (1879) both repay perusal. In the *Law Magazine* (4th series) there is much discussion of property and conveyancing reform; and the foundation of the *Law Quarterly Review* provided what the student will find to be one of the readiest means to authoritative information. Since the date of its foundation in 1885 there has scarcely been a volume which has not contained information of value to the student of real property. A detailed analysis of the contents would be impossible in the space available, and it must suffice to state that in the past volumes of the *Law Quarterly Review* the student will find a ready guide to contemporary discussions and contemporary literature. He will find it convenient to bear in mind that Volume X contains an index to the first ten volumes (covering the period from 1885 to 1894, inclusive), and thereafter each fifth volume contains an index covering the preceding five years. During the second half of the nineteenth century interesting discussion appeared in the *Law Times*. In particular mention may be made of an article entitled *The Simplification of Conveyancing* (vol. 92, 1892, p. 255) and of a long series of articles entitled *To Simplify Titles* in volume 96 (1893–94).

From the foregoing sources the student will be able to follow the development of his subject during the closing years of the nineteenth century. Expository editions of the statutes passed during this period are numerous, and the chief among them have already been indicated in Section I. It remains merely to indicate some works of a critical nature. Friend's *Perexigua or Land Transfer on Short Lines* (1885) is interesting rather than valuable. There is useful material in Birkbeck's *Historical Sketch of the Distribution of Land in England* (1885), which contains suggestions for improving the law. Scrutton's *Land in Fetters* (1886) is a masterly account of the historical causes which hampered the free alienation of land. In 1886 the Bar Council issued a *Statement on Land Transfer* and the Council of the Law Society issued a *Statement of the Land Laws*. Both are interesting as evidence of professional opinion. *Registration of Title to Land* by Brickdale and Sheldon (1886) is a plea for non-compulsory registration by authors who were well acquainted with the practice of this branch of the law. [Note also their *Land Transfer Acts*, 1875 *and* 1897 (1899), *Practice at the Land Registry* (1891) and *Methods of Land Transfer* (1914).] Underhill's *Freedom of Land and what it Implies* (1887) is a masterly statement of the hindrances to free alienation, and it has acquired an additional interest by reason of the prominent part played by its author in connexion with the legislation of 1925. In the Middle Temple Library is a copy of John Topham's *Review of the Provisions of the Land Transfer Bill* (1888). This contains some valuable criticism. Professor Jenks' inaugural lecture delivered before the University of Melbourne in 1889 and entitled *The Future of British Law* covers a wide field and contains some reference to real property. Colquhoun Dill's *Transfer of Land by Registration of Title* (1893) contains a good general discussion of the subject-matter of its title; and there is valuable comparative material in Fortescue-Brickdale's *Notes on Land Transfer in Various Countries* (1894) and in Cliffe-Leslie's *Land Systems of Ireland, England and the Continent*. R. B. Morris's *Land Mortgage Registration* (1895) is particularly useful because it contains a full list of works on the subject. The comparative method is used to interesting purpose in Blyth's *German and Austrian Systems of Land Registry and their Application to England* (1897). There is a fair analysis of the situation in Wright's *Law of Landed Estates, with the Customs of the Country* (1897). Maclaurin's *Nature and Evidence of Title to Realty* (1898) exposes some conveyancing anomalies. There is some useful criticism as well as an accurate statement of the law in Guffin's *Testamentary Executor in England and Elsewhere* (1899), and in Holdworth and Vickers' *Law of Succession* (1899). Garnier's *History of the English Landed Interest* (1908) is a learned work in two volumes. Its outlook is mainly social; it is fully annotated and contains valuable references. Hogg's *Treatise on the Law relating to the Land Transfer Acts* (1906) contains critical material. Harvey's *Land Law and Registration of Title* (1910) contains a comparison of the old and new methods of transferring land. Rubinstein's *Land Transfer "Scandal"* (1913) is a somewhat vigorous attack on registration.

SECTION III.

The History of the 1925 Legislation.—The Law of Property Act, 1922, provided a general measure of reform which, according to the original intention, was intended to come into operation on January 1, 1925. It provoked considerable discussion which made it obvious that detailed amendment was necessary in some particulars and that consolidation was desirable of various statutes and rules of law which it affected. Some of the most constructive of the discussion appeared in the *Law Journal*. The result was that the Act of 1922 was amended in various particulars by the Law of Property (Amendment) Act, 1924. This prepared the way for the consolidation which was effected by the legislation of 1925.

By far the best starting-point for a study of this portion of the subject is Sir Leslie Scott's little book *The New Law of Property Explained* (1925). This contains the speech made by Sir Leslie Scott as Solicitor-General on moving the second reading of the Law of Property Bill, 1922. It is edited, in a way which displays much learning, by Bertram B. Benas. The notes refer to the relevant sections of the Acts of 1925 and to previous decisions which those Acts affected. There is also a valuable table of arrangement of the new legislation and an index under one chronological list of the statutes affected by the new measures. The speech itself has been truly described as "the most luminous account of the changes which the new legislation effected," and the investigator who follows up the references given by Mr. Benas will find that he has travelled a long way towards a detailed understanding of his subject. Another valuable general introduction will be found in Underhill's *Concise Explanation of Lord Birkenhead's Act.* This work is founded on a series of lectures delivered in Lincoln's Inn Old Hall during November 1922. It is not a detailed exposition, and it is by no means so fully annotated as the work above-mentioned; but it is exceptionally clear and forms an excellent introduction to the broad principles of the new law. Those who desire a more detailed analysis of the Act of 1922 will find it in *Law Notes Guide to the Law of Property Act*, 1922, which analyses the new measure and its relation to pre-existing law in an accurate and practical manner. Note should also be made of Wilkinson's *Guide to the Law of Property Act*, 1922, and an *Epitome and Guide to the Law of Property Act*, 1922, by Marcy and Formoy.

The student who has perused these works will find a valuable means to more detailed information in J. H. Johnson's *Bibliography of the New Property Acts*, published in the *Law Quarterly Review*, Vol. XLI, 67. This commences with a useful foreword by way of general introduction, and the main body of the bibliography is divided into six parts.

Part I deals with *official reports and memoranda* (A) relating to the Land Transfer Act, 1897, (B) relating to Registration of Title, (C) relating to Lord Haldane's Bills, 1913–15, (D) relating to the Law of Property Act, 1922, and subsequent amending and consolidating measures.

Part II deals with the Parliamentary Debates on the Law of Property Bill (1920–2) and gives references to Hansard.

Part III deals with the activities of the Law Society (A) in relation to Registration of Title, the Wolstenholme Bill and other Bills supported by the Law Society for the purpose of improving conveyancing off the register, (B) in relation to Lord Haldane's Bills, (C) in relation to the legislation of 1922–5.

Part IV deals with periodical literature relating to (A) the Wolstenholme Bill, 1896, (B) the Land Transfer Act, 1897, and the registration question, (C) The Royal Commission on Land Transfer, 1909–11, (D) Lord Haldane's Bills, (E) the Fourth Report of Sir Leslie Scott's Committee, (F) the Law of Property Bills, 1920–2, and Lord Birkenhead's Act, (G) the Acts of 1925.

Part V deals with books on the Act of 1922.

Part VI deals with prints of Bills.

It has been suggested that Mr. Johnson's work would have been improved had it contained some description of the contents of the sources to which it refers. Had it done so, however, it would have required an impossible amount of space, and the titles of the sources given sufficiently indicate their contents to the interested reader. Altogether Mr. Johnson has done an accurate and comprehensive piece of work. It may be added, however, that there are some useful articles in past issues of the *Law Times* which he does not notice. In particular reference may be made to the following:

Volume 149: *Transfer of Land*, p. 18; *Law of Ownership*, p. 61; *Estates Legal and Equitable*, p. 79; *Mortgages*, p. 99; *Registered Land*, p. 119; *Amendment of the Land Transfer Acts*, p. 209; *The Ultimate Aim of Land Reform*, p. 261.

Volume 154: *Fifty Reminders on the Law of Property Act*, 1922, p. 272;

Chancery Practice, p. 116; *The Law of Property Act*, 1922 (a lecture by C. P. Sanger, p. 132).

Volume 156: *The Law of Property Act*, 1922 (a series of critical articles commencing 4th August, 1923, p. 80).

Volume 157: *How to read the Law of Property Act*, 1922, p. 214.

Note may also be made of two articles by Percy Bordwell in the *Harvard Law Review*, one entitled *Seisin and Disseisin* (vol. xxxiv) and the other *The Repeal of the Statute of Uses* (vol. xxxix). The same writer contributes to Volume II of the *Iowa Law Review* an article on *Property Reform in England*.

SECTION IV.

The Law of Property of To-day.—It was only to be expected that the new legislation would produce a plentiful literature, and it seems convenient to arrange the subject-matter of this section under several headings.

A. New Works of a General Nature.—It is surprising how few entirely new works of substance have been called into being by the new law. Outstanding among the few that have been published is Cheshire's *Modern Law of Real Property* (1st ed., 1925; 2nd ed., 1927). This work has rapidly risen to the position of a standard authority. It contains an exposition of the new law and comparisons with the old. The first edition contained a useful summary of the principal changes introduced by the legislation of 1925 with parallel indices of the relevant sections of statutes. This has been omitted from the second edition. The work is scientific in character and is written in an attractive style which, accompanied as it is by scrupulous accuracy, makes it eminently suitable for students. It makes little attempt to meet the needs of practitioners. In direct contrast, but also useful, is the *Guide to the New Property Legislation* by the editors of *Law Notes*. This work, from which many practitioners have gained their first knowledge of the new system, makes no attempt at scientific exposition. It takes the new law, analyses its concrete provisions and indicates its relations to the old law, and the work is so accurate that it forms what is probably the most convenient guide to anyone who seeks the changes made on any particular point. A supplement bringing this work to date has been published under the title of *Property Statutes up to date* (1930). There is also a straightforward and accurate statement of the modern law in Rivington's *Law of Property in Land* (1930). Valuable introductions to the new law are also to be found in Prideaux, *Precedents in Conveyancing* (22nd ed.), Underhill and Snow's *New Conveyancing* and Wolstenholme and Cherry's *Conveyancing Statutes*. These works are mentioned below. In *Cambridge Legal Essays* (1926) there is a valuable contribution by G. Glover Alexander on *Recent Developments in Conveyancing Law*.

Some of the best general introductions to the new law are to be found in comparatively small volumes containing reprints of courses of lectures delivered about the time of the passing of the legislation of 1925. These are fairly numerous and of very varying quality, but the best of them probably will have permanent value. Outstanding among them is Sir Benjamin Cherry's *New Property Acts* (1926). This work consists of a reprint of a series of lectures delivered by Sir Benjamin Cherry to the Law Society on the eve of the coming into operation of the new legislation. It contains an introduction by the late Lord Haldane, and it is well indexed by W. G. Fossick. One of the several valuable features of the work is that it gives the questions put by members of the audience and the answers given by the lecturer. The lectures were reported at the time of their delivery in the *Solicitors' Journal*, and the main part of the volume is practically a reprint from that periodical. In view of the leading part played by the lecturer in framing the new legislation and also of the influential character of his audience these may be regarded as the chief of the many series of lectures above referred to. Mr. A. F. Topham was also one of those who took part in the framing of the new legislation, and this fact lends added value to his *Law of Property Acts*, 1925, which contains a reprint of a series of lectures delivered to the Solicitors' Managing Clerks' Association. Among the reprints of shorter series of lectures mention should be made of J. M. Baily's *New Law of Conveyancing and Property*, W. G. H. Cook's introduction to the *New Law of Property and Conveyancing*, R. R. Formoy's *Lectures on the Practice of Conveyancing under the* 1925 *Acts*, J. M. Easton's *Lectures on the Practice of Conveyancing under the* 1925 *Acts*, and John Radcliffe's *New Law of Property*. These all differ somewhat in their method of treatment and also in the scope of their contents, but they are all essentially practitioners' commentaries, and they are all reliable.

B. Works of a General Nature (*New Editions*).—The new law involved the revision of existing works. One of the first to appear was Williams on *Real Property* (24th ed., by R. A. Eastwood). In this an attempt was made to incorporate the new law into a well-known and standard work. Particular attention was paid to transitional provisions. As the editor of the work under discussion is also one of the editors of this bibliography it must be left to the reader to judge with what success the work was accomplished. In 1929 there appeared *The Modern Law of Real Property and Chattels Real*, by Goodeve and Potter. This is a sixth edition (prepared by H. Potter), of Goodeve's *Real Property*. It contains a few minor inaccuracies, but, on the whole, the work of editing has been exceptionally well done, and the book forms a good general exposition of the modern law. There is also a seventh edition (1926) of Strahan and Baxter's *General View of the Law of Property*. This is an elementary work which contains in one volume an account of the law of both real and personal property. The present edition suffers from the fact that the new law is not incorporated into the text but forms an addition by itself, and that addition is probably too short to serve its purpose. Under the general editorship of Dr. G.

C. Cheshire, *Stephen's Commentaries on the Laws of England* (19th ed., 1928) has been much improved, and Volume II (for which Dr. Cheshire is himself responsible) contains one of the best elementary expositions of the modern law of property. A first edition of Topham's *New Law of Property* appeared in 1923 and a second in 1925. These are really revised editions of the author's earlier book on *Real Property*. The work suffers from the fact that it is not written in the form of continuous narrative, and compression has led the author in some cases to state dogmatically a view to which the student should be conducted by a process of reasoning. But the language is clear and notably free from unnecessary technicality, and the work can be recommended to anyone who seeks in a short space a general view of the subject. Deane's *Principles of Conveyancing*, an elementary and to some extent forgotten work, has recently appeared as two books edited by W. Lyon Blease ; namely, Deane and Blease, *Law of Real Property* (3rd ed., 1926), and Deane and Spurling, *Elements of Conveyancing* (4th ed., 1925). Both are useful, though elementary, works which have been improved by their new editor. The *Elements of Conveyancing* contains a good set of simple precedents. A work for rather more advanced students is Gibson's *Conveyancing* (12th ed., 1925, by Rivington and Fountaine). Primarily intended as a text-book for students reading for the Final Examinations of the Law Society, this work now fulfils much more than its original purpose. In the absence of an up-to-date edition of Elphinstone's *Conveyancing*, Gibson is regarded by many as the best short exposition of the principles of the law of real property as applied to the practice of conveyancing. It contains a useful short survey of the new legislation but no precedents. A readable work covering much the same ground is Strahan's *Concise Introduction to Conveyancing* (3rd ed., by L. B. Tillard). This contains a number of simple precedents well selected to illustrate the matters discussed in the text. Messrs. Rivington and Fountaine are responsible for a new issue (20th ed., 1929) of Snell's *Principles of Equity*. Under their editorship this work has improved in value, and the new law is accurately incorporated in the text. An interesting, and in some respects unusual, work is Theobald's *Law of Land* (2nd ed., 1929), which contains a learned treatment of the natural and acquired rights and obligations arising out of the use and enjoyment of land.

C. Commentaries on and Editions of the Statutes.—A small volume, entitled *Students' Property Statutes*, by G. R. Y. Radcliffe, appeared in 1927. This contains no commentary and merely sets forth and indexes those portions of the new statutes with which it is thought the student should be familiar. The work of selection is done well. This is the only work of the kind prepared solely for the use of students. Other collections have been prepared with the needs of the practitioner in view. Chief among them are Wolstenholme and Cherry's *Conveyancing Statutes* (11th ed., by Sir B. Cherry, John Chadwick, J. R. Perceval Maxwell and

D. Hughes Parry). This work is profusely and accurately annotated. Underhill and Snow's *New Conveyancing* (1925) is composed mainly of a reprint of the statutes. Apart from the convenience of having the new legislation collected in one well-indexed volume, the chief value of this work lies in the introduction which has already been mentioned. Of distinct practical value is Carson's *Real Property Statutes* (3rd ed., by H. W. Law) which contains efficiently annotated copies of the new Acts. Equally valuable and very conveniently arranged are the annotated editions of the statutes by Aggs and Law. These deal with the Settled Land Act, 1925, the Trustee Act, 1925, the Law of Property Act, 1925, the Administration of Estates Act, 1925, and the Land Charges Act, 1925. They are all separately published, with full and accurate notes, and in the case of some of the statutes there are useful introductions. Less ambitious is Hugh Pollock's *Law of Property Acts*, 1922–25, which reprints the legislation of 1925 together with the unrepealed portions of earlier statutes. There are valuable notes of a practical character in Marcy's *Notes on the New Property Statutes* (1925). Broughton's *Reminders on the New Property Statutes* (1925) is unpretentious but useful. Shebbeare's *Administration of Estates Act*, 1925, contains some useful explanatory notes together with references to decisions and a table of distribution. There is a very good practical guide to procedure at the Land Registry in *The Land Charges Act*, 1925, by Stewart Wallace and Nottage; and in the *Index Guide to the Law of Property Acts*, by O'Connor and Sykes, the reader will discover a short work which facilitates reference to the various sections of the Acts. Of more general collections of annotated Statutes mention may be made of Chitty's *Statutes*, the last edition of which was published in 1911 and thereafter was kept up-to-date by annual supplements. In 1929 appeared *Everyday Statutes*, which periodically are to be brought to date by Chitty's annual volume. Both collections include the subjects of real property and conveyancing. A new venture which promises to become a standard work of reference is Halsbury's *Statutes*. The first volumes were published in 1929, and the work is to be completed in twenty volumes and to be kept regularly revised by means of cumulative supplements.

D. Collections of Precedents.—Just as the new legislation has produced few entirely new text-books, so also has it resulted in few entirely new collections of general precedents. Indeed, the only new collection of note seems to be *Conveyancing Precedents under the Property Statutes*, 1925, by Hubert A. Rose (1st ed., 1925; 2nd ed., 1928). This contains a collection of precedents which are entirely new. They are accurate and comprehensive and certainly deserve the popularity which they have attained. Most practitioners, however, rely on revised editions of classic volumes which have a long history and an established place in the conveyancer's library. To draw comparisons between the merits of many of them would be invidious, but certainly Prideaux' *Precedents in Conveyancing* holds a very high place.

The twenty-second edition (1926) was prepared by Sir Benjamin Cherry and J. R. P. Maxwell and is the result of very careful revision. Equally popular and covering almost identical ground is the collection of *Precedents in Conveyancing*, by Key and Elphinstone. The twelfth edition (1926) was prepared by F. T. Maw and others, and the work of revision has been accomplished in a very reliable manner. There is a comprehensive set of useful forms and precedents in Bythewood and Jarman's *Precedents in Conveyancing*. The second edition by S. L. Bathurst and D. C. L. Cree, assisted by others, appeared in 1926. A twenty-first edition of Davidson's *Concise Precedents in Conveyancing*, edited by T. Murray, also appeared in 1926. This is a very reliable collection, and its use is facilitated by the fact that the subjects dealt with are arranged in alphabetical order. Mention must also be made of *The Encyclopædia of Forms and Precedents* (2nd ed., 1925–6). This is a most comprehensive collection. One criticism levelled against it is that some of its forms are not so neatly expressed as they might be ; but it is found in practice to be very useful in cases for which other collections do not provide suitable precedents. The *Conveyancer* is a journal of conveyancing which first appeared in 1925 and is published monthly. It contains both articles and precedents. The articles vary in quality, but the quality of the precedents is usually high. An unambitious, but interesting and sometimes useful, publication is Rouse, *The Practical Man* (19th ed., 1930). It contains hints of a simple, practical character on ordinary legal matters and gives a number of simple precedents. Precedents which are reliable for ordinary occasions will also be found in Smith's *Legal Forms for Common Use* (1930). There are useful and comparatively simple forms of wills in Brighouse's *Short Forms of Wills*. More comprehensive is the well-known collection by Hayes and Jarman, *Forms of Wills* (15th ed., 1926, by Shebbeare). Authoritative forms and precedents for use in connexion with land registration are to be found in *The Land Registration Act*, 1925, by Fortescue-Brickdale and Stewart Wallace. The work also supplies a good guide to procedure and practice. There are useful references to precedents in Broughton's *Reminders for Conveyancers* (5th ed., 1927).

E. Works on Particular Topics.—There are innumerable works falling under this head, and the most that can be attempted is to indicate the chief. Conveyancing and the law relating to vendors and purchasers of real estate account for a large number of volumes. One of the most welcome new editions is the eighth edition of Dart's *Treatise on the Law and Practice relating to Vendors and Purchasers of Real Estate* (1929). This brings a standard authority to date in a very reliable manner. The ordinary process of re-editing has not been followed as yet with the classic work on *Vendors and Purchasers*, by Mr. T. Cyprian Williams. The third edition of this work appeared in 1922. A supplementary volume entitled *The New Property Code* by C. H. Devonshire was published in 1927, and Mr. Williams himself has published *The Contract of Sale of Land as affected by the Legislation of* 1925. This latter work is complete in itself but foreshadows a new edition of the work on vendor and purchaser. A smaller but deservedly popular work is Seaborne's *Vendors and Purchasers of Real Estate and Leasehold Property.* In the space of one volume it deals accurately with most of the topics encountered in general practice. The ninth edition (1927) was carefully prepared by W. A. Jolly and C. H. S. Fifoot, and a supplement has been published. Emmett's *Notes on Perusing Titles and on Practical Conveyancing* constitutes a conveyancer's guide of great merit. An eleventh edition of Volume I appeared in 1926 and a corresponding edition of Volume II in 1927. A twelfth edition of Volume I was published in 1930. A sixth edition, by Brydges and Banks, of Moore on *Title* was published in 1925. It constitutes a reliable practical guide. Gossett's *Modern Investigation of Title* (1926) has earned a wide popularity among conveyancers. It is a supplementary volume to Jackson and Gossett's *Investigation of Title*, the last (4th) edition of which appeared in 1922. *The Interpretation of Deeds*, by Elphinstone, Norton and Clark, was published in 1885 and became a standard work. It is now known as Norton's *Treatise on Deeds* (2nd ed., 1928, by Morrison and Goolden). The work has been carefully revised, but in its present form it is somewhat unsatisfactory. The new law is inserted into the original framework by means of short paragraphs which marginal notes distinguish as " new law." The result is that there is sometimes retained material which might have been omitted, whilst the exposition of the new law suffers from compression. A convenient work which is popular with solicitors is Kelly's *Draftsman* (7th ed., 1929). A short work which deserves to be better known is Cosway's *Conveyancer's Notebook* (3rd ed., 1929). This contains a clear working account of the new legislation with some pointed criticism and useful practical advice. Gordon's *Compulsory Acquisition of Land* (1929) is a new and useful work; and there is reliable information on the subject of the title in Calton's *Tables of Conveyancing Costs* (1928).

The Interpretation of Wills and Settlements, by Underhill and Strahan (3rd ed., 1927), is a standard authority into which the new law has been incorporated by J. B. Richardson. Another standard work is Hawkins's *Construction of Wills.* It first appeared in 1863, and a third edition (1925) incorporating the new law has been prepared by C. P. Sanger. Mr. Sanger is also responsible for an excellent new edition (7th ed., 1930) of Jarman's *Law of Wills*, an exhaustive work in three volumes. Theobald's *Law of Wills* (8th ed., 1927, by J. I. Stirling) is a recognized authority.

Williams' *Law of Executors and Administrators* is a leading work. It has been revised with much learning and commendable judgment by D. Hughes Parry and John Cherry (12th ed., 1930). Walker's *Compendium of the Law of Executors and Administrators* (6th ed., 1926, by S. E. Williams) has been a standard authority for several generations, and it has lost none of its value in the hands of its present editor. A reliable short summary of the present law of intestacy is to be found in Moore's *Brief Guide to the New Code of Intestacy* (1925); and Sanger's *Rules of Law and Administration Relating to Wills and Intestacies* (2nd ed., 1925) is a handy and accurate guide.

There are many useful accounts of the law relating to Death Duties. Among them mention may be made of the works by Hanson (1925), Seward (1925), Wolfe and Dewar (1926), Phillips (1927), Cleary (1928), Beatty (1929) and Woolley (2nd ed., 1930).

With the exception of annotated editions of the statutes, there are few outstanding works dealing specifically with the subject of settled land; but useful, if unpretentious, short summaries of a practical character are to be found in Cosway's *Devolution of Settled Land* (1927), and in the same author's *Settled Land Conveyancing* (1930). Each of these works contains a supplement of precedents. Mr. Cosway has also written *A Practical Guide to the Land Charges Act*, 1925 (1927). There are useful practical hints in Withers' *Reminders on Reversions* (1929).

Coote's *Treatise on the Law of Mortgages* (9th ed., by R. L. Ramsbotham, 1927) is one of the most reliable of modern authorities on the subject dealt with. The editor's revision has been accurate and skilful. Strahan's *General Law of Mortgages* (3rd ed., 1925) is not wholly satisfactory. It is primarily a work for students, and for its primary purpose it loses much of its value by the fact that references to the new law are given mainly as footnotes and are not adequately expounded. Fisher's *Law of Mortgage* is a classic which unfortunately has not been revised since the new legislation came into operation. The last edition, the sixth, was published in 1910.

On the subject of leases one can recommend Arnold's *Covenants Relating to Leases and Tenancy Agreements* (1930). Woodfull's *Landlord and Tenant* (22nd ed., by A. J. Spencer, 1928) is the most up-to-date of the standard works on the subject of its title. Unfortunately, the most recent editions of Redman's *Law of Landlord and Tenant* (8th ed., 1924) and Foa's *Relationship of Landlord and Tenant* (6th ed., 1924) were published before the new legislation was passed; but in the case of Redman the defect is almost cured by an excellent supplement published in 1928. Jackson's *Agricultural Holdings* (7th ed., 1928) is a practitioner's work of recognized merit; and the subject of mining leases is well treated in *Mining Law* by Bamber and Hunt (1930).

Gale's *Law of Easements* (10th ed., 1925) is an accurate and exhaustive work, into which the new law has been incorporated by W. J. Byrne.

There is an excellent guide to the present position of enfranchised copyholds in Hart's *Enfranchisement of Copyhold and Extinguishment of Manorial Incidents* (1926). Statute law relating to the same subject is arranged with full notes and a valuable introduction in a handbook on *Copyholds, Manorial Incidents and Perpetually Renewable Leaseholds*, by Aggs and Law (1925).

On the subject of trusts there are three excellent modern editions of well-known works. An eighth edition of Underhill's *Law of Trusts and Trustees* appeared in 1926. This is probably the clearest exposition of the subject, and it is not often that a point arises in practice on which this work does not throw some light. A fifth edition of Godefroi's *Law Relating to Trusts and Trustees* was produced by Mr. H. G. Hanbury in 1927. The new law has been incorporated with skill and real scholarship. Lewin's *Law of Trusts and Trustees* (13th ed., 1928, by W. Banks) contains the most comprehensive account of this subject. It is not so readable as Underhill's work, but the treatment is so detailed and accurate that the book is one of the best-known works of reference. There is an exhaustive and reliable treatment of charitable trusts in Tudor's *Law of Charitable Trusts* (5th ed., 1929, by Carter and Crawshaw).

There is a valuable guide to the effect of the new legislation on court procedure in Mr. E. Riviere's handbook, *Powers of and Applications to the Court under the New Property Acts* (1926), and there are useful reminders in Fellows' *Everyday Points in Practice under the Law of Property Act* (1928).

The late Dr. E. P. Hewitt and Mr. J. B. Richardson incorporated the new law with much success in White and Tudor's *Leading Cases in Equity* (9th ed., 1928).

Finally, it may be pointed out that a ready means to information on any branch of law is afforded by Halsbury's *Laws of England* which is annually revised by means of a cumulative supplement. The first volume appeared in 1907, and the whole series had been issued before the new legislation was passed. For that reason the work is somewhat inconvenient to the reader who wishes to study the effect of the new legislation, since he has to seek a large part of his information in the supplement. The supplement, however, contains adequate references to the main volume.

F. Periodical Literature.—There has accumulated a voluminous literature under this heading in the form of articles and commentaries on decisions appearing in *The Law Journal, The Solicitors' Journal* and *The Law Times.* Such material appears weekly and forms a running commentary on the working of the new legislation. Space forbids any attempt to set forth a detailed analysis, but the reader will find that each of the periodicals referred to is so well indexed that he will have little difficulty in tracing the articles on any particular topic that may interest him. These sources of information ought not to be ignored, for they contain some of the most pointed criticism as well as excellent expositions of the new system. Pride of place must be given to the weekly articles by Mr. J. M. Lightwood in *The Law Journal* which have gained a special place in the literature of the new property law. Mention has already been made of the short articles which appear in the *Conveyancer. Law Notes* is a monthly journal intended for students, though practitioners sometimes find it of value. It contains some clear expositions of parts of the new law, and there is an excellent annual index from which its contents may be traced.

Among articles of special note in *The Law Quarterly Review* are the following:

Covenants annexed to Rent Charges, by W. Strachan (vol. xl, 1924).

The Land Charges Act in Jurisprudence, by J. S. Stewart Wallace (vol. xli, 1925).

Trusts for and Powers of Sale and the Rule of Perpetuities, by Cyril J. Radcliffe (vol. xli, 1925).

Compound Settlements in the Settled Land Act, by Eustace J. Harvey (vol. xlii, 1926).

Joint Tenants under the Law of Property Act, 1925, by R. R. Formoy (vol. xlii, 1926).

Partnership Property, by H. G. Hanbury (vol. xliii, 1927).

Tenant by the Courtesy of England, by F. E. Farrer (vol. xliii, 1927).

Conflicting Marriage Settlements, by A. C. Wright (vol. xliv, 1928).

A Periodical Menace to Equitable Principles, by H. G. Hanbury (vol. xliv, 1928).

Restrictions on User, by E. C. S. Wade (vol. xliv, 1928).

Repetition of History in the Statute of Uses and the Settled Land Act, 1925, by Harold Potter (vol. xliv, 1928).

The Field of Modern Equity, by H. G. Hanbury (vol. xlv, 1929).

Undivided Shares in Land, by Harold Potter (vol. xlvi, 1930).

Restrictive Covenants affecting Land, by W. Strachan (vol. xlvii, 1930).

Among relevant articles in the *Cambridge Law Journal* are *Estates Tail under the New Law*, by C. P. Sanger (vol. ii, 1925) and *Trusts for Sale*, by J. M. Lightwood (vol. iii, 1927). The latter is probably the best short account of the subject discussed that has appeared since the new legislation.

The problems presented to teachers by the new law are discussed by the late Professor W. M. Geldart in an article on *The Law of Property Bill and the Teaching of Law* (*Law Quarterly Review*, 1923). To this article is added a prefatory note by Professor W. S. Holdsworth. Professor D. Hughes Parry contributed to the *Journal of the Society of Public Teachers of Law* (1928) a stimulating and well-reasoned paper entitled *Teachers of Law and the New Property Legislation.*

There is a comprehensive article entitled *The English Property Legislation*, by R. R. A. Walker, in the *Journal of the Society of Comparative Legislation* (3rd. series, vol. x, 1928).

The Annual Survey of English Law published under the auspices of the London School of Economics and Political Science promises to afford a ready means to an acquaintance with the development of any branch of English Law. It was first published in 1929, and each volume deals with legal development during the preceding year. Each topic is in the hands of an expert who indicates and comments on the statute-law, the case-law and the literature of his subject.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

The Indian Round Table Conference.—The most important feature of the Round Table Conference has been the rather unexpected readiness of the Indian Princes to accept the suggestion of the Simon Commission Report that the evolution of India on a federal basis is essential as the sole means of securing effective unity. The fundamental problem for the Princes is to secure their position as against the development of responsibility in the central government of India. They cannot for a moment be expected to accept the view pressed even by a comparatively moderate spokesman of British Indian aspirations, Mr. Srinivasa Sastri, that the central government of British India must, even when made responsible to a British Indian legislature, retain its existing powers as regards the States. On the other hand, it is impossible to regard with satisfaction the idea of a divided control in India ; on the one hand, the States in direct relations with the British Crown as represented by the Imperial Government, and, on the other hand, British India under responsible government. The Simon Commission was, therefore, working on the only wise line of approaching the problem when it emphasized the necessity of the development of provincial autonomy in British India as a prelude to the possibility of devising a federal system for the whole of India. Such a system cannot clearly follow the model of any existing or past federation, and the essential value of the Conference will depend on the ability which its members show to agree on some system under which the Princes can retain their autonomy in local matters, while effectively co-operating in the wide fields of questions which can only be dealt with on a common basis for the whole of India.

The Protection of British Interests.—One question of special importance to the United Kingdom is the question what safeguards can effectively be devised to secure the absence of discrimination against British commerce and industry in the event of the concession of increased powers to the legislatures of British India. The plan of requiring the Governor-General and the Governors of the provinces to reserve bills injuriously affecting British interests is clearly inadequate, for the simple reason that interference of this kind is always resented, and becomes rapidly more difficult of exercise, as it is based on the mere assertion of superior authority. A more promising line of approach rests on the possibility of including as part of the settlement the conclusion of an agreement between the British and Indian Governments on the basis of absolute equality of treatment in all matters of immigration, the exercise of professions and occupations, and all matters of commerce, trade and navigation. The complete reciprocity of such a proposal would place India and the United Kingdom on a formal and material equality, which could not be regarded as derogatory to Indian aspirations, and, on the other hand, any discrimination against British subjects domiciled in the United Kingdom or companies incorporated in the United Kingdom would be a breach of the agreement. If any violation of the agreement were to occur, and if a dispute arose as to whether the action impugned were such a breach, the issue would be finally determined by the Privy Council or such other inter-imperial tribunal as might be agreed upon, while the Governor-General would be empowered, if necessary, to suspend the operation of any executive or legislative measure which was in apparent contradiction with the obligations of India under the compact. The necessity of some such safeguard is easily realized when the terms of the Bill to reserve the Coasting Trade to Indian-controlled shipping are borne in mind, for that measure, if passed in the form in which it was brought forward, would have excluded British-controlled shipping from a trade in which it has been engaged with much profit to India for many years. The agreement, of course, would in no way derogate from the fiscal autonomy of India in the sense that India might raise tariff barriers at pleasure against British imports, but it would also require that the United Kingdom and India should each refrain from giving to any other country, British or foreign, a preference over the other.

The Optional Clause.—The discussion in the Australian House of Representatives of the acceptance of the Optional Clause of the Statute of the Permanent Court of International Justice elicited two points of importance. Mr. Crouch raised the issue whether the approval of the Senate was either necessary or desirable in such cases, arguing from the denial in the case of the Union of South Africa that the approval of the Senate was necessary, the view in Canada that, while it was proper, it was not requisite, and the failure of the Government of the United Kingdom to obtain the approval of the House of Lords. He pointed out that the refusal of the approval of the House of Lords in the case of the Declaration of London had rendered it impossible for the British Government of the day to accept the Declaration, incidentally resulting in the power to exercise a blockade sufficient to end the war. Mr. Crouch's questions are, of course, to be answered by the fact that ratification of any treaty rests with the Crown, and that it is for the Crown to decide on what authority it will act. In the case of the Optional Clause acceptance did not necessitate legislation in any part of the Empire, and accordingly each government could ratify on its own authority, which naturally meant that it would obtain approval from the Lower House, and might or might not ask the Upper House also to approve. In the case of the Declaration of London, the British Government could not ratify without legislation on one minor issue,[1] and the refusal of the Lords to pass the necessary Bill precluded the possibility of ratification. In the Commonwealth the Ministry could in the case of the Optional Clause have acted without any motion being accepted in the Senate, but clearly it is better to secure the approval of both Houses, and the same process was adopted as regards the acceptance of the amendments to the Statute of the Permanent Court and of the conditions on which the United States has accepted the invitation to participate in the work of that Court. In the second place, Mr. Hughes, while admitting that the Government could not withhold its approval, predicted gloomily that the result might be that the issue of immigration would be submitted successfully against Australian desires to the Court, pointing out with perfect justice that, while the question of immigration in 1919 was deemed to fall outside international jurisdiction, it was impossible to hold that this would always be the case.[2] He deplored also the failure of the Commonwealth to take part in framing Imperial policy, and regretted that the pacifist aims of the British Government had elicited so slight a response from rival powers.

The Naval Treaty.—The debates in connexion with the necessary legislation to give effect to the London Treaty for the Limitation and Reduction of Naval Armament of April 22, 1930, were marked by agreement on all hands with the policy of the unity of the naval forces of the Empire, which, as Mr. Latham insisted, had been proved by experience to be compatible with Australian autonomy in matters of fleet maintenance and control. He insisted also that, if Australia had endeavoured to stand out, the United States and Japan would have declined to accept limitation, with disastrous results. Mr. Fenton explained that the question of the distribution among the parts of the Empire of the fleet units permissible under the treaty was not dealt with during the negotiations, and had been left over for further discussion. A Labour member, Mr. Curtin, insisted not merely on the inability of Australia in any measurable period to defend herself save with British aid, but also on the dangers inherent in the development of chemical warfare and air transport.

Canadian Representation Overseas.—It is satisfactory to learn from the Prime Minister of Canada that there is no intention of adopting the unsatisfactory practice—at one time not wholly unknown even in England—under which diplomatic representatives change with a change of government. It has been decided to treat the Canadian Ministers at Washington, Tokyo and Paris on the basis of non-political appointments. In the case of the High Commissioner at London different considerations apply, apart from the fact that he is not technically in the position of a minister, though it is impossible to accept Mr. Bennett's criterion that he is appointed by the government, while a minister is appointed by the King. There are clearly advantages in having the High Commissioner virtually an intimate associate of the Dominion Government, a position actually occupied by Sir Charles Tupper in that office.

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[1] Keith, *Responsible Government in the Dominions* (1928), ii. 923.

[2] Wheaton, *International Law* (ed. Keith), i. 574.

The Diplomatic Representation of the Union of South Africa.—The discussion in the Union Parliament of the functions of the representatives of the Union in foreign countries revealed a most gratifying degree of harmony between the two parties as to the purpose and the value of the steps taken to establish oversea legations. The Prime Minister went out of his way to pay one of the most emphatic testimonials ever recorded of the appreciation felt in a Dominion of the care with which Dominion interests were handled by British diplomats, and made it clear that special representation was desired only in cases where there were substantial South African interests which British officers could not be expected to have the requisite knowledge of Union conditions to handle to the best advantage. This is, of course, the real justification of oversea representation by special ministers, and General Smuts, who accepted the policy, wisely stressed the necessity of concentrated effort. He pointed out from his personal observation that to secure effects abroad a lavish expenditure was requisite, and that, therefore, the Union should concentrate on what was worth such expenditure and be prepared to meet the cost. It is clear that, as the Union thinks it well to rely on British naval protection, so in the main she is glad to use the services, willingly accorded, of British diplomacy and the British consular service. The Irish Free State similarly is glad to have recourse to a like procedure, as in the case of the *modus vivendi* of May 15, 1930, with the Greek Government. In these cases the British Minister at the foreign court acts, of course, on the instructions of the Secretary of State for Foreign Affairs, though at the instance of the Irish Free State Government, and it is satisfactory to note that the Free State, departing from the unhappy model of the German treaty accepted by the Union, expressly reserves the right to treat differentially parts of the British Commonwealth of Nations, a term which in this connexion no doubt coincides with the British Empire. It is important also to note the emphatic testimony borne by General Hertzog to the close co-operation existing between the Union Ministers and the British representatives at Washington, The Hague and Rome. This is what matters, and it is probably needless to discuss the academic point which Mr. Louw, the Minister at Washington, has stressed in an address of October 22, 1930, at Springfield, Illinois, to the surprise of legal authorities in the United States, whether the British Empire is an international unit. In a sense the United States has already answered the question in practice, for it has insisted on the whole of the Empire being treated as a unit for the purpose of the London treaty for the limitation of naval armaments, which leaves it to the several parts of the Empire to allocate *inter se* the proportions of the total forces allowed. The conclusion suggested is that in essentials for international purposes the Empire must still function as a unit, whatever degree of variation is possible in the minor affairs of international intercourse.

The British High Commissioner in South Africa.—The approaching termination of the period of office of the Earl of Athlone, who succeeded admirably in carrying out the duties of Governor-General of the Union, resulted in the decision of the Imperial Government to effect a change in the office of High Commissioner. Hitherto the post has been held along with that of Governor-General, and this position was very appropriate so long as the Governor-General was the channel of communication between the Union and the Imperial Governments; but, since this has ceased to be the case, and the Governor-General has become solely the constitutional head of the Union Government, it is natural that the combination of offices should cease. At the same time it has been held natural and convenient to transfer to the High Commissioner the function of representing in the Union the British Government in the same way as the High Commissioner represents British interests at Ottawa. The High Commissioner controls, of course, the affairs of Basutoland, and of Swaziland and the Bechuanaland Protectorate, and in this supervision, together with his functions in respect of native administration in Southern Rhodesia, he will be able to keep in touch with the views of the Government of the Union, while not failing to give effect to British policy as directed by the Secretary of State. The choice of Sir H. Stanley, who has been successful in guiding the path of Ceylon to its new constitution, is specially fortunate because of his South African experience. A claim has of late been enunciated on behalf of the Union [1] that its policy should predominate in all matters of relations between the Europeans and the natives in South and Central Africa, but clearly any such demand is without foundation. However inconvenient it may be for the Union that British policy should be based on the doctrine of trusteeship for the natives and not on the principle of European supremacy, it is plain that the doctrine of autonomy must be applied to the United Kingdom also, and that all that can be claimed or conceded is that in native policy each part of the Empire should have regard to the difficulties confronting other parts. If the British attitude creates difficulties for the Union, it is no less clear that the trend of native policy in the Union has a disquieting effect on the territories under British control. The suggestion that Northern Rhodesia should be amalgamated with Southern Rhodesia, however plausible at first sight, would mean that in the great area of the protectorate there would be applied doctrines which run counter to the doctrines enunciated by successive British Governments and in the case of Tanganyika enforced by the mandates system. It is not surprising that, speaking at Glasgow on December 20, 1930, the Under-Secretary of State for the Colonies declared that British public opinion would not accept any form of Monroe doctrine on native policy for Africa with the Union as the deciding factor.

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[1] Mr. P. G. W. Grobler, Minister for Public Lands, speech at Pretoria, September 17, 1930.

Female Suffrage in the Union.—The racial issue has necessarily reappeared in the decision of the Union finally to accept the doctrine of female suffrage. The normal procedure, of course, would have resulted in the extension of the vote to women in each province on the same footing as it is given to men, but this would have meant the extension of the right to vote to native women, duly qualified under the existing rules in the Cape. General Hertzog, therefore, adopted the simple plan of enfranchising every adult European woman, and in doing so he went out of his way to repudiate the idea that any white person in South Africa could be subjected to a civilization test of any kind. This doctrine, which involved a denunciation of school education and the remarkable dictum that civilization had little or nothing to do with intellectual education, was not unjustly censured by General Smuts. Its interest lies in the fact that it negatives decisively the ideal of Cecil Rhodes of equal rights for all civilized men, and its practical importance in the fact that the women of the Cape and Natal are now placed on a more favourable footing than the men of these provinces. On the other hand, the value of the native franchise in the Cape is still further depressed by the increase in the European vote, a result by no means specially satisfactory in view of the fact that, as was admitted in the debates on the Natives (Urban Areas) Act, 1923, Amendment Bill, Parliament is far from effectively informed of native needs and aspirations, and is most reluctant to take the obvious step of referring Bills affecting natives to Select Committees which can take native evidence. General Hertzog expressed some regret at inability to enfranchise coloured women, his policy including the separation of the coloured population from the native. But, while all white women must be assumed to be civilized, this could not safely be held true of coloured women, and it was not practicable to give them the franchise without letting in native women. It is all to the good, however, that efforts are at last being made to secure areas for the settlement of coloured persons, though the fundamental issue of setting aside adequate lands for natives has not been faced.

Customs Relations between the Union and Rhodesia.—The acceptance by the Union and Southern and Northern Rhodesia of the customs agreement has naturally been greeted by General Smuts as a movement in favour of his ideal of an ultimate federation or union of these territories at least with the Union. The same view was expressed by the spokesman of the Government of the Union in securing approval of the agreement. It was based on the determination of Southern Rhodesia to secure autonomy in tariff matters, for under the former system, while the Union was free to manipulate her tariff at pleasure, Southern Rhodesia was tied to the tariff of the Union in 1924. The most unfortunate result was that, when the Union reduced its tariff on certain items, the old rates remained in Southern Rhodesia, so that, even with the British preference, the Union manufacturers using these imports were able to undersell in the colony its own manufacturers. The new agreement accordingly once and for all recognizes Rhodesian autonomy, but at the same time is calculated to induce the Rhodesias to contemplate union or federation. This results, in the view of the Union Government, from the system under which to avoid customs barriers the two Governments pay allowances to each other in respect of products and manufactures exported to the other; thus the Union will pay 12 per cent. on foodstuffs and certain other exports, and 6 per cent. on other manufactures, while Southern Rhodesia will pay in respect of her manufactures. The result is curious; a section of the Union community, already protected by a high tariff and aided by reductions in duties on its raw materials, will be subsidized at the expense of the country at large in order to secure its output free entry into Rhodesian territory, and the Minister of Finance is doubtless right in insisting that political aims alone would justify this mode of action. This avowal of such aims had some effect in causing uneasiness in certain quarters in Southern Rhodesia, where, however, on the whole the merits of the new system were fully appreciated. The chief loss to the colony from the cessation of the former freedom of trade arises in respect of tobacco; under the new scheme a quota is imposed, of 2,400,000 lb. for Southern and 400,000 lb. for Northern Rhodesia, while these territories likewise will limit to 150,000 and 50,000 lb. their imports of Union leaf tobacco. The Rhodesian market will in some measure be rendered more secure for the British exporter, for Germany will not enjoy the benefits granted to her by the Union tariff, which were naturally very unpopular in Rhodesia. One constitutional point of some slight interest was raised. Objection was taken in Southern Rhodesia to the fact that the agreement was signed by the Minister of Finance in the Union, but by the Governor of Southern Rhodesia. The explanation of the divergent treatment afforded by the Rhodesian Treasurer was not convincing, and as a matter of form the agreement should clearly have been signed either by the Governor-General and the Governor or by the Minister of Finance and the Treasurer; presumably the Rhodesian Government followed the model of the former agreement, ignoring the changed form adopted by the Union. The binding force of the compact is, of course, the same in either case.

The Scope of the Indemnity Act, 1920.—It is possible to feel considerable sympathy with the suppliant in the case of *Bucknall* v. *The King.*[1] His claim against the Crown by petition of right rested on his depositing with the British Consul at Petrograd at the suggestion of the latter jewellery, precious stones, and banknotes to the value of £57,932. In due course in 1918 the consul was arrested, and his safe was rifled, whence arose the suppliant's claim against the Crown for the value of the lost property. Various defences of substance were raised by the Attorney-General for the Crown, including the suggestion that the facts were not as alleged in the petition, that the loss was due to stealing which had taken place without negligence of the consul, or that the action taken was an act of State on the part of the Russian Government. But the matter was disposed of in the Court below [1] and by the Court of Appeal on the score that the claim was barred by the Indemnity Act, 1920. On this score there could hardly be any doubt. The Act applies to all acts done, whether within or without the United Kingdom, during the war by any officer in the exercise of his duty in good faith, and it was clear that the consul's action fell precisely within this category unless it could be argued that " during the war " did not cover any action which was not done " in consequence of the war," and that the consul's action was not so done. Clearly it was impossible to establish any such doctrine. It was, however, pointed out that the suppliant could under the Act itself have brought an action for breach of contract if he had done so within one year of the termination of the war. There remained, however, the power to bring an action in respect of damage to property in any foreign country, but for that purpose the assent of the Attorney-General was necessary, and it was withheld. There appears a certain incongruity between the consent of the Home Secretary being given to the bringing of the petition of right, on the one hand, and the refusal of the Attorney-General's assent to the taking of proceedings under the provision of the Act, on the other, for the Home Secretary in these matters is advised by the Law Officers of the Crown. But it was made clear by the Home Secretary, when allowing the petition to be brought, that the Attorney-General would plead the Indemnity Act, so that the suppliant was fully aware that his case would be met by reliance on the statute, and no doubt it was felt that it would not be right to refuse to allow him to argue that the Act did not apply to his case, however difficult such an argument might be. The best point clearly against the suppliant was the failure to claim in contract within the period granted by the Act.

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[1] 46 T.L.R. 449.

The Crown and Treaties.—The exact functions of the Crown in regard to the negotiation and execution of treaties was once more raised in the very interesting case of *Civilian War Claimants' Association* v. *The King*.[2] The merits of the claimants' case were very great. They were able to show that the most explicit assurances had been given to them by Mr. Lloyd George that their claims to reimbursement for damage inflicted on them by enemy action would take priority over any other burdens on the reparation payments of Germany, and that this promise had been definitely broken by the adoption in 1925 by Mr. Churchill of the policy of applying to the reduction of French and other allied debts to the United Kingdom the British receipts from German reparations. Moreover, there is no question here of inflated demands ; the amounts claimed have been passed as reasonable by the Sumner Commission, and thus, so far as equity is concerned, the claims put forward on the Crown were unanswerable. But it was obviously difficult in face of the decision in *Rustomjee* v. *The Queen* [1] to expect a favourable outcome for the claim. In that case it was decided that a merchant could not by any form of legal process force the Crown to distribute to him the portion which he claimed from the sum of three million dollars which under treaty were paid by the Emperor of China in respect of the claims of certain British merchants. It was, however, endeavoured to distinguish the cases. It was admitted that it could not successfully be contended that the Crown could act as the agent or trustee of any subject in making a treaty of any kind. But this doctrine need not be applied to the further question of distribution of funds received under a treaty, and in support of this contention was adduced the procedure by means of the Clearing House provided for in the Treaty of Versailles, the Act giving effect to that Treaty and the Orders in Council thereunder. Could it be contended that the Crown was at liberty to ignore the destination of the sums obtained by this procedure and to divert German payments to purposes foreign to the purpose of the Treaty on that score ? The answer of the court was probably inevitable. Without deciding whether even in the case mentioned the Crown could be deemed an agent or trustee for the beneficiaries of the proposal, it was essential to note that the matter was regulated by statute and Orders in Council thereunder, while the claim in question rested only on the treaty and common law. Indeed, the existence of this legislation was an indication that it was impossible otherwise to establish such a relationship as that of agency or trusteeship in regard to the distribution of funds, and accordingly the decision in *Rustomjee* v. *The Queen* must be deemed to govern the position still. However much sympathy may be felt with the claimants, the result appears to be inevitable in law.

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[1] 46 T.L.R. 388.

[2] 46 T.L.R. 581 ; affirmed on appeal December 30, 1930 ; 47 T.L.R. 102.

The Dominion and Aeronautics.—The distinct limitations of the Dominion powers under the federal constitution of Canada have once more been conspicuously illustrated by the extremely negative character of the decision of the Supreme Court on the reference to it of the issue of the authority of the federal Parliament to deal with air navigation.[2] It might perhaps have been expected that the general grant of federal authority and of residual power would have been deemed by the court adequate ground for allocating to the federation the authority to deal with such a new form of transport. But this was utterly contrary to the view of the court, which held unanimously that such powers as the Federation might possess must be derived from the specific powers accorded by s. 91 of the British North America Act, 1867, to deal with trade and commerce ; the postal service ; militia, military and naval service and defence ; and naturalization and aliens. The specific power to deal with navigation and shipping, which was naturally referred to, was deemed to be inadequate and inapt to cover aerial navigation. It is, of course, perfectly true that in 1867 no one intended these words to mean anything but sea navigation, but it might have been thought that, acting on the bold interpretation given by the Privy Council in the issue as to the eligibility of women to the Senate, the court might have held that, if new methods equivalent to navigation could be devised, it might be held that the federal power attached to them. But the court felt very strongly that the rights of control of aerial matters within the provinces must naturally appertain to the provinces in virtue of their right to deal with property and civil rights. Newcombe J. cited the maxim *cuius est solum eius est usque ad caelum*, and art. 414 of the Civil Code of Quebec, which assigns to ownership of the soil ownership also of what is above and what is below it.

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[1] (1876) 1 Q.B.D. 487 ; 2 Q.B.D. 69.

[2] Biggar, *Can. Bar. Rev.*, viii. 587–92.

Dominion Legislation in Treaty Matters.—But the lack of federal authority can, in the opinion of the court, be remedied by the device of the acceptance of treaty obligations by the Crown in respect of Canada, in accordance with the doctrine laid down in *Attorney-General of British Columbia* v. *Attorney-General of Canada*.[1] It is clear that Cannon J. holds that the exercise of legislative power to implement treaties belongs to the federation only in the event of failure to act on the part of the provinces, and that Newcombe J. inclined to a rather similar view. But the rest of the court clearly held that there was no limitation of this sort to the powers of the federation, and that, when a treaty was duly made, it was free to legislate without according time to the provinces for action. It is, of course, clear on principle that the provinces can legislate to implement treaties, but the trend of the judgments in this case suggests that the federation has a primary duty to legislate. This view is very interesting, for after all it is only a few years[2] since the fact that use might be made of the treaty power to invade by federal legislation the sphere of the provinces was fully appreciated, and there is no doubt that in it is implicit a certain risk to the provinces. In this case, it is clear, judicial interpretation is giving a wide extension of federal power, and thus tends to restore to the federation some of the authority of which it certainly was deprived by the tendency of the earlier decisions of the Privy Council to insist on the autonomy of the provinces in their own sphere. An incidental question, not actually decided in any clear sense, concerns the effect of the embodiment in the Revised Statutes of 1927 of the Air Board Act, 1919, under which were made the Air Regulations, 1920. Duff J. was clearly of opinion that, as these regulations were issued before Canada became a party to the International Convention relating to the regulation of aerial navigation, they must be deemed invalid, despite the fact that the Act itself appears as the Aeronautics Act in the Revised Statutes (c. 2); but Anglin C. J. held that the regulations might be deemed valid, since the Aeronautics Act took effect only on February 1, 1928, long after the Convention had become effective in Canada, although the provisions had long been deemed to be legally effective. As in any case the regulation of air navigation should be federal, it is fortunate that the result may in considerable measure be thus achieved, but it is impossible to deny that the case illustrates once more the difficulties arising from a constitution so old, and so defective in power of change.

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[1] [1924] A.C. 203, 211–13.

[2] Keith, *Responsible Government* (1912), iii. 1122–4.

Delegation of Powers in Canada.—It would, of course, be simple enough if it were possible for the provincial legislatures to agree to delegate to the federal Parliament full control of air navigation, but there seems still to be very serious doubt as to whether this mode of procedure would be legally valid. The issue has once more been discussed in Canada in connexion with the apparent attempt of the federal Parliament in the Lord's Day Act to permit the provinces to allow things to be done on Sunday which would otherwise fall under the prohibitions in the Lord's Day Act. That delegation of power is possible is clearly asserted in *Clarke* v. *Rural Municipality of Wawken*[1] by Martin J. A. But any such assertion was sedulously avoided by the Privy Council in dealing with the case of *Lord's Day Alliance of Canada* v. *Attorney-General for Manitoba*,[2] that case being decided on a ground which rendered any pronouncement on the question unnecessary. On the other hand, the Privy Council did not negative the possibility of delegation, and the observations of Duff J. in *Ouimet* v. *Bazin*[3] can be deemed merely to stress the improbability of the federal Parliament intending to give the provinces power to alter the criminal law, without actually denying that such a power might be accorded. The difficulty in the way of those who contend against the power of delegation is that it is admitted that the federal Parliament can delegate a measure of authority as regards subordinate legislation to such authorities as the Governor in Council, and it is difficult to see any conclusive argument against delegation to a provincial legislature or vice versa. The Privy Council has apparently admitted the possibility of the legality of legislation in a province by a proceeding of popular initiative,[4] and it is difficult to see any conclusive reason for holding that it must have been the intention of Parliament when it enacted the British North America Act to compel the Parliament of Canada and the provincial legislatures to adhere rigidly to their own spheres in the sense that neither could confer on certain topics legislative power on another.

Delegation under the Divorce Act, 1930.—Another aspect of delegation of authority arises under the Canadian legislation of 1930 which at long last has done justice to Ontario and permitted its domiciled citizens to secure divorce without the unsatisfactory procedure of application to Parliament. The law which was made applicable to causes turning on the dissolution of marriage in Ontario is now the English Matrimonial Causes Act, 1857, as amended up to July 15, 1870, and by subsequent Canadian legislation, and as affected by Ontario legislation indirectly affecting divorce, which itself is withheld from provincial authority. The rules which the judges of Ontario have made, under the powers given by the new legislation or the Judicature Act of the province, are decidedly curious in the generosity with which the power of rule-making has been interpreted,[1] and it certainly seems that in part at least their validity may be doubtful, however generous may be the interpretation which it is desired to give to the power of rule-making. Thus it is required that the plaintiff's solicitor in a divorce proceeding must file an affidavit of his faith in his client's case, and he is made subject to disciplinary action if at the trial his affidavit proves incorrect. It may be conceded that it is desirable that divorce cases should not lightly be promoted, but, if the requirement is just, it ought clearly to be extended to the defendant's solicitor, and applied in a large number of other causes of action, where vexatious litigation is common. Still less attractive is the rule that a decree absolute shall be made at the hearing unless the Attorney-General intervenes and satisfies the judge that a decree nisi should first be made, in which case it will normally be made absolute in three months. The system of decrees nisi is based on very sound grounds of public interest, and it is difficult to see what powers the judges have to alter a principle which is laid down in the Acts amending the Act of 1857. Again the rule that no matrimonial cause may be tried by a jury may or may not be expedient, but it is flatly contrary to the existing legislation, and assumes in the judges a power by rule to alter the Acts. It may well be that the possession of such a power by judges is desirable, but if so it ought clearly to have been conferred by Act, and not merely assumed.

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[1] [1930] 2 D.L.R. 596.

[2] [1925] A.C. 384, 392.

[3] (1912) 46 Con. S.C.R. 502, 526.

[4] *Rex* v. *Nat Bell Liquors*, [1922] 2 A.C. 128; Keith, *Responsible Government*, i. 304 f.

Provincial Misdemeanours.—The assignment of the criminal law to the federation was the origin of an interesting point which arose in the Manitoba case *Rex ex rel. Morrison* v. *Sirkis.*[2] A provincial statute penalized the exercise of a certain profession without obtaining a licence and registration, and declared that any person neglecting the rules laid down should be guilty of a misdemeanour and liable to a stated penalty. The question was, therefore, raised in defence whether it was competent for the province to invade the sphere of criminal law by adding to the list of statutory misdemeanours. Fortunately the issue was satisfactorily disposed of by ignoring the description adopted in the Act, and by holding that the Act clearly dealt with a matter which fell under the provincial power as to property and civil rights or matters of a local and private nature, in respect of which a province may punish by fine or imprisonment,[1] and that as the penalty and the offence were clearly stated, the misdescription was of no weight.

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[1] C. Martin, *Can. Bar. Rev.*, viii. 561–9.

[2] [1930] 2 W.W.R. 93.

Legislative Authority over Protectorates.—An interesting but not novel application of the doctrine of legislative supremacy over protectorates is afforded in the case of *The North Charterland Exploration Co.* (1910) *Ltd.* v. *The King*.[2] The suppliant company claimed to be owner of certain land in Northern Rhodesia under a Crown grant, and alleged that this grant had been infringed by an Order in Council of March 22, 1928, under which certain portions of their lands were declared to be native reserves vested in the Secretary of State. The whole issue, therefore, was whether the Crown by Order in Council under the Foreign Jurisdiction Act, 1890, could derogate from what, for the purpose of the case, there being a demurrer to the petition of right, must be assumed to be a Crown grant. There could be hardly any doubt on such an issue. To hold that the Crown by executive action could prevent itself from exercising its legislative authority would have been preposterous, and the court had no difficulty in ruling that the Order in Council must be deemed to be conclusive. The only point which, therefore, could arise was whether the company could claim compensation for the taking away of property, and it was ruled that, while it would be assumed in a case of doubt that property if taken away was to be paid for, the terms of the Order in Council were too clear to permit of any claim being brought for compensation. It is plain, though the matter could not be decided on the demurrer, that the Crown was acting under the authority it had always possessed towards the British South Africa Company, whence the title to the land ultimately was derived, to require the setting aside of native reserves out of any granted land, but, clearly as the power of the Crown to legislate had been challenged, it was necessary that it should once and for all be asserted.

The Validity of Campbell v. Hall.—The court, however, made an observation regarding the effect of *Campbell* v. *Hall*[3] which it is not easy to follow. It was apparently held that since the passing of the Foreign Jurisdiction Act, 1890, the decision could have no further operation. This dictum is obiter, but clearly cannot be sustained. *Campbell* v. *Hall* dealt with British territory only, and cannot therefore be affected by any measure which essentially is restricted in operation to foreign territory in which British jurisdiction is exercised. The doctrine of *Campbell* v. *Hall* is a fundamental principle which is as operative to-day as when it was first announced. It is that, when the Crown grants a representative legislature to any territory, even a conquered or ceded colony, it cannot thereafter alter the constitution or legislate for that territory unless it has expressly reserved the right so to do. The necessary precaution to reserve the right to legislate and to change the constitution has been observed in the two recent cases of Malta and Ceylon, which are a testimony to the living character of the famous decision of Lord Mansfield.

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[1] British North America Act, 1867, s. 92 (13), (16) and (15).

[2] 46 T.L.R. 566.

[3] 1 Cowp. 204; cf. Keith, *Const. Hist. of First Brit. Empire*, p. 15.

Personal Law in India.—An interesting light on the complexity of the law of India is thrown by the discussions in *Peal* v. *Peal*[1] which raised the question of the validity of the marriage of a man with the daughter of his paternal grandfather contracted in India under the dispensation of the Roman Catholic Church. The marriage, of course, was one which under the English law as enacted in 32 Henry VIII, c. 38 would be void on the score of consanguinity, but the issue was complicated by the question of domicile. The great-grandfather of the husband entered the East India Company's service in 1835 and his descendants since then had been habitually resident in India, but there was evidence that they all looked to England as their true home whither they would return if they could afford so to do. Lord Merrivale held that, as the domicile of origin was English, it might well be that such a domicile could persist in the family despite the fact of birth in India and prolonged residence in the case of all save the great-grandfather. But he decided the case on the assumption that the parties were in fact domiciled in India, and that the law applicable to them was that affecting British subjects, being Christians. On this basis it was contended for the putative wife that in *Lopez* v. *Lopez*[2] it had been ruled that a marriage between a man and his deceased wife's sister, celebrated under the Indian Christian Marriage Act, 1872, was valid, a dispensation having been obtained from the Roman Catholic Church. The Act expressly does not render valid any marriage which a man's personal law forbids him to enter into, and the case, therefore, prima facie supported the defendant's contention. But it was distinguished on the score that the persons there concerned were not British subjects, but probably Goanese, whose personal law permitted such a marriage. It would have been strange if the Indian legislature had insisted on subjecting non-British persons to restrictions based on English law, but that did not mean that any relaxation had been made as regards marriages of British subjects who normally were subject in these matters to the principles of English law affecting status as introduced into India from time to time. It was, therefore, ruled that, even on the assumption that the parties were domiciled in India at the time of the marriage, the marriage was invalid, though of course the decree nisi of nullity would not be made absolute until the wife had the opportunity of presenting a petition to the court to protect her material interests and to provide for the care and upbringing of the child of the marriage.

[1] 46 T.L.R. 645.

[2] (1885) I.L.R. 12 Calc. 706.

NOTES.

Women at the Bar in Palestine.—In a valuable essay, published in this *Journal* in 1928, Professor H. A. Smith reviewed and criticized the doctrines of the Common Law Courts as to interpretation of Statutes. The advisory opinion of the Judicial Committee in *Edwards* v. *Attorney-General for Canada* [1930] A.C. 124, which may well be termed revolutionary, indicates a change of heart on the subject in English legal circles, and the decision will, we may be allowed to hope, be as seed sown in good ground, to bring forth fruit a hundredfold.

At any rate, fruit has already been brought forth in the good ground of Palestine. A lady having applied to be examined with a view to admission to the Palestine Bar, her application was rejected, on the ground of sex, by the Legal Board, the official body charged with the duty of controlling admission. Nothing daunted the applicant, with all the courage of her sex, brought the Board before the Supreme Court on an application for a Mandamus, and boldly appeared in person.

The argument turned upon the interpretation of the provisions of the Ottoman Regulations as to admission of advocates and on the Advocates Ordinance, 1922. It was admitted that no woman could be proved ever to have been admitted to the Ottoman Bar under the Regulations in force in Palestine before the War. But neither these Regulations nor the new Ordinance, which had superseded them, contained any provision inconsistent with the admission of women. On behalf of the Board, it was pointed out that the same provisions of the Ordinance regulated admission before the Civil and before the Moslem Religious Courts. To interpret the Ordinance as permitting the admission of women, was, therefore, to attribute to a non-Moslem and foreign legislator an intention to make a change alien to the traditions and sentiment of the majority of the population.

Whether good or bad, the argument for the Board did not prevail. The Presiding Judge (Corrie J.) in the course of his judgment, remarks :

" It is not suggested by the Petitioner that before the British Occupation, any woman did in fact exercise the profession of an advocate, either in Palestine or in any other part of the Ottoman Empire ; but the Petitioner argues that this was purely the consequence of the social custom which then restricted a woman from practising a profession, and that it is not for the Court to give to such a custom the force of law. In support of this argument, the Petitioner has cited a passage from the judgment of the Judicial Committee of the Privy Council, delivered on

October 15, 1929, in *Edwards* v. *Attorney-General for Canada*, in which it was held that women were qualified to become members of the Canadian Senate. In the course of their judgment, their Lordships said (at p. 134):

" ' The fact that no woman had served or has claimed to serve such an office is not of great weight when it is remembered that custom would have prevented the claim being made or the point contested. Customs are apt to develop into traditions, which are stronger than law and remain unchallenged long after the reason for them has disappeared.'

" This dictum appears peculiarly applicable to the social conditions of the Ottoman Empire before the War.

" One point has been raised with regard to the context. It has been argued that the terms of s. 5 of the Advocates' Ordinance, 1922, apply equally to Civil and to Moslem Religious Courts, and that it cannot have been the intention of the legislator to permit women to qualify to practise as advocates before Moslem Religious Courts. In considering this argument, however, it must be borne in mind that no provision of the Ottoman law excluding women from practising before the Sharia Courts has been cited in this Court. I must, therefore, conclude that, if the appearance of a woman as an advocate before a Sharia Court was repugnant to Moslem sentiment, the occurrence of such an incident under the Ottoman Regime was prevented not by any legislative prohibition, but by virtue of the social custom to which reference has already been made. It is therefore, not fatal to the interpretation which the Petitioner asks the Court to put upon s. 5 that such interpretation would make it legally possible for women to practise before the Sharia Courts."

F. M. G.

Protectorate.—Political Status of Cyprus between 1878–1914.—The Anglo-Turkish Arbitral Tribunal at Constantinople in a case decided on December 16, 1929[1] had to decide whether Cyprus during the British occupation under the Convention of June 4, 1878, was in the legal sense a " Protectorate." That term is not used in the Convention under which Cyprus was " assigned to H.B.M. to be occupied and administered." The claim was brought by certain Cypriotes against the Turkish government for the restitution of a house which had been seized by the Turkish government on August 29, 1914. Cyprus was formally annexed on November 4, 1914.

The Turkish government objected to the competence of the Tribunal on the ground that on October 29, 1914 the claimants were Turkish nationals. They could not at the earliest have commenced the formalities necessary to become British subjects before November 4, 1914 and even if their recognition retroacted to the date when they lost their Turkish nationality under art. 21 of the Treaty of Lausanne they were not British subjects but Turkish on October 29, 1914 and so could not sue the Turkish government before the Tribunal (art. 65, Treaty of Lausanne). The court rejected this plea and sustained its competence on the ground that on October 29, 1914 Cyprus was a British Protectorate and that accordingly the claimants were covered by al. I of art. 64 of the Treaty of Lausanne which includes among those entitled to raise claims persons who are under the " protectorate " of one of the Allied Powers. The Convention of 1878 though it did not employ the term " Protectorate " and did not formally eliminate the sovereignty of the Sultan did in fact in the opinion of the Tribunal convey to H.B.M. the powers of government and administration which characterize a protectorate in the sense of international law.

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[1] Affaire no. 309, *Parounak and Bedros Paroumakian* v. *the Turkish Government.*

Judicial Control of Legislation.—We have not in English a familiar expression to denote the power (where it exists) of the courts to declare an Act of Parliament to be unconstitutional. This is explained, we suppose, by the fact that in England no power of this kind belongs to the courts. Nor is there much ground for believing that they ever possessed such a power, though every schoolboy knows the old *dicta* about Acts of Parliament being void if they are " against common right and reason." No case has come to light in which an English court has declared an Act duly passed by the legislature to be void upon any such ground. And at this time of day no court would listen to argument on the point.[1] The subject has therefore for us no actuality.

But there are many countries in which this is by no means the case, as we are reminded by the discussions at the meeting in Paris in 1928 of the *Institut International de Droit Public*. On the contrary, the *contrôle constitutionnel*, or as it is called in Germany, *das richterliche Prüfungsrecht* is an extremely live issue on the Continent.

We are not concerned here with subordinate legislation, as to which in all countries, including England, there is judicial control, but only with Acts of Parliament. As to these there appears to be a tendency abroad in Europe to create judicial control. There has, we suppose, never been in Europe such an outburst of constitution-making as in the post-war period. And constitution-making in itself is apt to suggest judicial control. It involves the creation *de novo* of a legislature by a constituent body exercising sovereignty. What more natural than to take the opportunity of laying down certain fundamental principles which are to be sacrosanct and of saying to the new legislature " thus far shalt thou go and no further ? "

And when this has been done it is almost inevitable that competence shall be given to a court—whether it be an ordinary tribunal or some special court—to decide whether an Act is or is not within the powers of the legislature.

All this is familiar to students of the constitutions of the United States in which curious illustrations may be found of matters " reserved " from the legislature. The "Bill of Rights" or "Declaration of Rights" which figures in the State Constitutions indicates a varying degree of distrust of legislators. It is almost a clause of style that the right of the citizen to bear arms must not be interfered with. Some States prohibit the introduction of the law of primogeniture, or the permission of lotteries, or the appropriation of any public money for the support of any church or sect. Some constitutions indulge in sentiments such as "The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue and by frequent recurrence to fundamental principles."[1] On which we can only say with Mr. Bunsby—"The bearings of this observation lays in the application on it."

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[1] See Allen, *Law in the Making*, 2nd ed., p. 267.

When fundamental principles are reserved in this way it is to be expected that a court will be empowered to decide whether the legislature has transgressed the boundary. And when the constitution is federal we expect to find some authority charged with the duty of deciding whether there has been a transgression of the limits laid down in the constitution for the central legislature and the local legislatures respectively. How difficult and important such questions may be is well seen in the Privy Council decisions on the Canadian constitution. But it is quite conceivable that a constitution should provide the means for determining questions as to the legislative competence of the central and of the local legislatures respectively and should, nevertheless, give no power to a court to find a law void because it conflicts with fundamental principles, though its subject-matter is one within the legislative competence of the legislature by which it was enacted. In fact, this is the view taken by many authorities of the constitution of the German *Reich*, as will be explained later. And it is quite a mistake to suppose that the mere fact that the constitution is *written* involves of necessity judicial control. Both France and Belgium have written constitutions but in neither country can the courts decline to apply a law which has been duly passed on the ground of its unconstitutionality.[2]

There are, however, in France some signs of reaction against this view and some eminent writers—among them M. Berthélemy—have expressed opinions in favour of a change in the law.[3]

In several of the new constitutions judicial control is introduced. In Ireland (arts. 65, 66), in Roumania (art. 103) and in Greece (art. 5) this is done by allowing the ordinary tribunals to hold that a law is unconstitutional. In Austria (arts. 137 *seq.*) and in Czechoslovakia (loi du 29 février,

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[1] Constitution of Wisconsin, s. 22. For other illustrations see Kettleborough, *The State Constitutions, passim.*

[2] See as to France the Constitution of 1791, tit. iii, ch. v, art. 32, Berthélemy, *Droit Administratif*, 11th ed., p. 16 and p. 271. As to Belgium, *Arrêt de la Cour de Cass. du* 10 *déc.* 1928 cited in *Annuaire de l'Institut International de Droit Public*, 1929, p. 325.

[3] *Annuaire*, p. 196 and see the observations of M. Mirkine-Guetzévitch in *Les Constitutions de l'Europe Nouvelle*, p. 33.

1920, art. III) a special court is created for the decision of such questions. The provisions of the Austrian law are particularly elaborate and the High Constitutional Court is composed of persons some of whom may be members of the chambers.[1]

But it is in Germany that there has been the greatest discussion and the greatest division of opinion about judicial control, and there is already a large literature on this subject.[2] The framers of the German constitution deliberately decided against inserting any provision regulating this matter. Many German specialists in public law—among them Anschütz, Thoma and Jellinek—have contended that in the silence of the constitution the courts have no power to examine the constitutionality of a statute of the *Reich*. The arguments on this side are presented very forcibly by Professor Richard Thoma in an address delivered in 1922 at the first *Konferenz der Deutschen Staatsrechtslehrer*.[3]

It is impossible in a few lines to do justice to the case which is there set forth in twenty pages of close reasoning, but in outline it is as follows: (1) The silence of the constitution raises a presumption that the old law on the subject was to continue in force. (2) The traditional law in Germany (and, it may be said, in Europe generally) is against judicial control. (3) Its introduction would lead to an amount of delay in the administration of justice and an expenditure of money and of judicial time altogether out of proportion to the advantages secured. (4) The risk of unconstitutional laws being passed has been much exaggerated. The constitution itself contains many safeguards—two-thirds majority in the Reichstag—veto by Reichsrat—referendum in certain conditions, and always if the President of the *Reich* so decides. With so many bulwarks and in view of the organization of the various interests and of the vigilance of the press there is not much danger of unconstitutional legislation. (5) If this danger were to become serious it would be time enough to make provision to meet it.

In spite of such arguments the trend of opinion is the other way, and in an important case subsequent to Professor Thoma's paper, the *Reichsgericht* has sustained its competence to examine the constitutionality of a statute, though, in the result, the statute was held valid.[4] It has been proposed to remove all such questions from the ordinary courts and to give exclusive competence to the *Staatsgerichtshof*, a special court composed of judges of the ordinary courts and of the administrative courts in equal proportions.[5]

What most strikes an English observer in all this matter is the earnestness with which in many countries defensive works are being built up against attacks by their own legislatures.

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[1] See some remarks on its working by M. Kelsen in *Annuaire*, p. 198.

[2] See Friedrich, Carl Joachim, "The Issue of Judicial Review in Germany," 43 *Political Science Quarterly*, 188 (1928), where there is a good deal of bibliographical information.

[3] *Archiv des öffentlichen Rechts*, xliii, p. 267.

[4] *Reichsgericht Zivil*, iii, p. 320 (Nov. 4, 1925).

[5] See the remarks of Professor Thoma in *Annuaire de l'Institut International de Droit Public*, 1929, p. 200.

F. P. W.

The Teaching of Roman Law in the United States.—In a recent number of this *Journal* the opinion was hazarded that in the United States the study of Roman law had fallen on evil days.[1] Through the kindness of Mr. A. Z. Reed, the author of the Carnegie Foundation Bulletin on "Present-Day Law Schools in the United States and Canada" (*Bulletin*, No. 21, 1928) we are able to give more precision to that statement. Instead of saying that "some of the American Law Schools have dropped Roman law altogether" it would be correct to say that this is the case in most of them.

At the present time there is no law school in the United States which treats Roman law as a compulsory subject in the undergraduate course. At Harvard we are told it appears only as part of the post-graduate curriculum which is intended primarily for law teachers. The table on p. 559 of *Present-Day Law Schools* shows that only a single one out of 265 students graduating from the professional three-year curriculum in 1927 was examined in Roman law at Harvard.

Roman law for obvious reasons is more firmly rooted on the continent of Europe. But it may be doubted whether even there it is holding its own. This is possibly due in some degree to the fact that many professors of Roman law have in the last generation been transferring their interest to textual criticism and to obscure questions of legal history.[2]

The new learning about interpolations is full of interest for the specialist, but it is difficult to persuade young students that it will be of much use to them in the practice of their profession.

F. P. W.

The Law of Nations and the Common Law of England.—In a recent number of the *Journal of Comparative Legislation*[3] Professor Berriedale Keith takes issue with me on the subject of the relation between the law of nations and the common law of England in the sixteenth, seventeenth and early eighteenth centuries. The matter is one of some importance, not only in the history of the conflict of laws and the position of international law to-day, but also in regard to the weight to be given to a judge's dictum on a matter of history. In 1764 and again in 1767 Lord Mansfield declared that the "law of nations is part of the Common Law of England."[4] In so far as the privileges of ambassadors are concerned I have, as I believe, proved that down to 1709 the common law granted them no protection at all, such special position as they enjoyed being secured to them solely by prerogative action; in 1709 the Act of 7 Anne cap. 12 established certain of their privileges on a legal statutory basis, but was far from affirming that the law of nations was part of the common law; that, therefore in 1764–7 on this topic, the very one with which Mansfield's judgment was concerned, his dictum was thoroughly unsound and in fact that, even to-day, it is not wholly true to say that the law of nations is part of the common law of England.[1]

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[1] Third Series, vol. xi, pt. iv, p. 273.

[2] *Ibid.* See Wenger, *Der Heutige Stand der Römischen Rechtswissenschaft.*

[3] Third Series, vol. xii, pt. i, p. 126.

[4] *Triquet* v. *Bath*, 3 Burr. 1480 (1764); *Heathfield* v. *Chilton*, 4 Burr. 2015 (1767).

The simplest procedure will be to quote seriatim the various arguments that Professor Keith advances against this view and then show how each of them can be refuted.

(1) " Mr. Adair . . . seems indeed to disbelieve Mansfield's definite assertion in *Triquet* v. *Bath* that Lord Talbot had laid it down in *Barbuit's Case* that the law of nations was part of the law of England. . . . This cannot be proved."

What I actually pointed out was that what Lord Talbot is reported as saying was that " 7 Anne cap. 10 (12) . . . is only declaratory of the antient universal *jus gentium*;"[2] this is a totally different thing from what Mansfield declared he had said. It is only in a note added to the case later that this *jus gentium* is said to be part of the law of England and as it is almost certain that this was added on the authority of what Mansfield said in *Triquet* v. *Bath*, Professor Keith is merely using Mansfield to confirm Mansfield. In other words, the only evidence that any judge held this view before Mansfield stated it, rests on his own unsupported word, and historically the word of a judge has no more value and no less than that of any other man.

(2) " To prove his case Mr. Adair should have adduced instances in which suits were brought against Ambassadors in the courts where absence of jurisdiction was pleaded and where it was disallowed." Professor Keith is here adopting the pernicious but very common habit of assuming that legal procedure to-day is the same as that in the sixteenth and seventeenth centuries. In my book on the *Exterritoriality of Ambassadors* I have quoted a dozen and more cases where the common law courts proceeded merrily to take action against ambassadors just as they would have done against ordinary men.[3] But no ambassador would ever enter an appearance or plead to any such action: a more dignified and proper course was open to him, that of appeal to the prerogative action

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[1] For the detailed evidence for these assertions see E. R. Adair, *The Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries*, or, for a more concise statement, an article by me in the *Cambridge Historical Journal* (vol. ii, no. 3, pp. 290–7 entitled " The Law of Nations and The Common Law of England."

[2] *Barbuit's Case*, Cases t. Talbot 281–3.

[3] See, for example, pp. 78–84, or the case of the servant of Anzolo Correr, the Venetian Ambassador, imprisoned for murder in 1635. Correr was told that " the laws of this country . . . make no distinction of persons," when he pressed for his release; indignantly he replied that the privileges of ambassadors " would amount to nothing if they were not outside the laws," but Secretary Coke persisted that the man must first be condemned by the ordinary court and then the King might show clemency. Finally, as the result of great insistence Correr secured his release (Adair: *Exterritoriality of Ambassadors*, pp. 140–1).

of the Privy Council which would at once quash the proceedings, if the ambassador were *persona grata* to the government; otherwise they might threaten to permit them to continue. This at once proves that the common law offered no protection whatsoever to the ambassador's privileges, and shows why such cases as Professor Keith demands cannot be produced: there were none. But this proves nothing beyond the fact that the procedure then and the procedure to-day are not the same. To turn Professor Keith's demand upon himself: where can he show a case before 1709 in which an ambassador pleaded his privileges in a court of common law as a sound defence and had that plea allowed?

(3) "Mr. Adair argues that before 1709 violation of an ambassador's immunities was not criminal, punishment being a matter for prerogative action and not a part of the common law. This seems hardly legitimate: the punishment inflicted by the Council in cases of the violation of the rights of Ambassadors . . . was doubtless regarded by Mansfield as a vindication of a breach of the common law inflicted by the appropriate court." This assertion hardly does justice to Professor Keith's, or even to Lord Mansfield's knowledge of the history of English law. In the first place the Council in the seventeenth century was not a court in the legal sense at all. Secondly, it did not administer common law, and any common lawyer of that day would have been horrified at the suggestion that it did so or that it was the proper place in which to punish offenders against a particular section of the common law. In fact, the Council was scrupulously careful to refer petitioners to the ordinary courts if their complaints came within the scope of the common law. Professor Keith's suggestion is a piece of special pleading that will not hold water for one moment.

(4) "Mr. Adair's actual argument rests on the view (1) that Blackstone did not agree with Mansfield, which may be added to the many errors of that excellent writer." This is hardly worthy of Professor Keith. As an authority on the history of English law Blackstone was as good as, if not better than, Mansfield, and the fact that he did not believe that before 1709 the ambassador's privileges were protected by common law, that is that he did not believe that the law of nations was part of the common law of England, goes a long way to cast doubt upon the truth of Mansfield's dictum.

(5) The Act of 1709 was passed as a result of the arrest on civil process of the Russian ambassador. As to this Professor Keith says "No suggestion was made that the Ambassador could not have obtained relief from the courts." The fact, however, remains that he was not able to obtain such relief and that he had to pay the debt for which he had been arrested. There is therefore every reason to suggest that the courts offered no more protection to an ambassador than to any other man.

(6) Professor Keith says that the passing of the Act of 1709 "in no way proves that the persons who arrested the envoy were not liable to punishment for the misdemeanour of arresting the Ambassador; the Privy Council obviously thought they were, for it had them tried in the

Queen's Bench, and the failure to proceed to sentence is most probably explicable by the fact that the judges could not have imposed any penalty at all commensurate with the desires of the Tsar for vengeance." Yet the prosecuting counsel were so doubtful of their case that they alleged "that 'twas a conspiracy to disoblige her majesties best allie, and endangering the loosing a most profitable trade to this nation."[1] Moreover it was not merely a failure to proceed to sentence; the prisoners were found guilty only so far as the facts were concerned, the question as to whether those facts were criminal by law was left to be argued by the judges and this was never done; in other words the issue was entirely evaded and the prisoners consequently were released without punishment. Professor Keith's explanation will not cover the facts. The real truth was that with the passing of the prerogative power of the Privy Council, there was no way of giving satisfaction to the privileges of ambassadors under the common law, and therefore the Act of 1709 had to be passed to preserve their persons and their servants from arrest; again a demonstration of the fact that the law of nations was not part of the common law of England in 1709.

(7) Again, Professor Keith says, "For civil purposes it [the Act of 1709] is regularly treated by judges as merely confirming the common law." And a most unhistorical and pernicious treatment this is, and one that is quite valueless as evidence here, for it is wholly based on the dictum of Mansfield under discussion, which other judges have repeated *ad nauseam*. Again Professor Keith is merely calling in Mansfield to prove Mansfield. It is especially noteworthy that contemporaries of the Act such as Lord Talbot, spoke of it as "declaratory of the antient universal *jus gentium*," which is very different from Mansfield's assertion and is perfectly sound.

(8) Professor Keith adds, "Unless and until the courts hold that the Act of Anne has any application to criminal proceedings against Ambassadors, the better opinion seems to be that it has not, and that it is not desirable that the statute should be extended beyond its obvious intention." This is rather legalistic timidity. Though admittedly the ways of judges are often dark, there is no reason why we should abdicate our powers of judgment until a relevant case is pleased to occur. The obvious intention of this Act was to protect the persons of ambassadors from the actions of the law; the terms are entirely general: "That all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any Ambassador . . . may be arrested or imprisoned . . . shall be declared and adjudged to be entirely null and void to all intents, constructions and purposes whatsoever." The corresponding United States statute, drafted in almost identical terms, has definitely been interpreted as referring to criminal as well as civil cases. And if Professor Keith really believes with Mansfield that the law of nations is part of the common law, why the pother? The law of nations

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[1] Luttrell: *Brief Relation of State Affairs*, vol. vi, p. 407.

protected the criminal ambassador, then the common law must do so as a matter of course.

In truth, however, Professor Keith has lent the weight of his great reputation merely to the bolstering up of the old legal delusion that *vox judicis vox dei est*: Mansfield has said so and therefore it is history. This, combined with a complete misinterpretation of the position of the Council in the seventeenth century has made his case a very weak one. It is doubtful if even to-day full protection could be secured to the ambassador by virtue of the common law, though judges in the nineteenth century repeating and acting upon the historically unsound opinion expressed by Lord Mansfield have created a prescriptive tradition in favour of the view that such protection exists. Even after the Act of 1709 the courts could not prevent the arrest of an unprivileged person within the precincts of the embassy[1] nor the execution of a search warrant therein, so long as it did not result in the arrest of the ambassador or any member of his suite; this leaves the executive free by the law of England to search diplomatic papers as it did in the Gyllenborg case in 1717 and in the case of the Russian Trade Delegation in 1927, however much that may be against international usage. Nor, before the laws against Catholic worship in England were repealed, could the courts have prevented interference with such worship within an embassy, so long as it did not involve the arrest of a member of the ambassador's suite. In cases such as these executive action was, and to some degree still is, the only protection an ambassador can invoke, and the reprimand of the over-zealous official may often be the beggarly cloak under which the government hides its own connivance at the breach of international customs or its impotence to override the laws of the land. The assertions that Lord Mansfield made in 1764 were radically unsound; to-day they are not wholly true, for even if the wit of man could decide beyond cavil what constituted international law, it would still not be in its entirety part of the common law of England.

E. A. ADAIR.

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[1] *E.g.* in the case of Gallatin's coachman who was arrested within the precincts of the United States' embassy, there is no suggestion that in this connexion the court was acting illegally. (See Satow: *Diplomatic Practice*, vol. i., pp. 296–299.)

NOTICES OF BOOKS.

THE CONSTITUTION OF THE EMPIRE.

It is most satisfactory that after twelve years it has been necessary to issue a new edition of Professor W. P. M. Kennedy's well-known *Documents of the Canadian Constitution.*[1] The chief alteration made in the original is the reduction of the documents dealing with the period from 1791–1840, and the extension of the section from 1867. Though they are easily accessible elsewhere, it is none the less very convenient to have included the report of the Imperial Conference of 1926 on the constitutional issues, and the consequent report of the subsidiary Conference of 1929, as well as the Covenant of the League of Nations. But even more welcome is the addition of an index, thanks to Mrs. Kennedy, remedying a defect which all users of the first edition have had cause to deplore. In a future edition we may hope to find rather more generous treatment of British Columbia and Vancouver Island and perhaps an increase in the size of the type, even at the expense of a considerable increase in size and price, quite justifiable in a work which all serious students of Canadian history will find indispensable.

So much has been written on mandates that little that is new can be added. But Mr. Norman Bentwich, the Attorney-General of Palestine, in *The Mandates System*[2] has written an interesting book with a view to showing that the record of mandatory administration "during the ten years that the system has been in existence has on the whole justified the incursion of idealism into the domain of the conqueror." It is satisfactory to find that intimate acquaintance with the difficulties of Palestine has not discouraged the author nor diminished his faith in the possibility of the mandatory combining the double purpose of the mandate for Palestine. The success with which immigration has been carried out is sufficiently shown by the fact that the Jews have increased from a tenth to a fifth of the total population, a fact which explains, if it does not excuse, the opposition of the Arabs to the system of immigration as recently conducted, and emphasizes the error which they made in 1923 in refusing to take advantage of the share in legislation and control of immigration then offered to them. As is inevitable in an officer of the government,

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[1] *Statutes, Treaties and Documents of the Canadian Constitution.* (London: Mr. Humphrey Milford, Oxford University Press, 1930.) Pp. xxviii + 752. Price 26*s*.

[2] *The Mandates System.* (London: Longmans, 1930.) Pp. x + 200. Price 15*s*.

Mr. Bentwich does not discuss the fundamental difficulty of the compatibility of the mandate with the Covenant of the League, nor the interesting if academic issue as to sovereignty. He gives, however, very clear accounts of the French efforts to provide the Syrian territories with constitutional government, and his statement of the functions of the Permanent Mandates Commission and of the intervention of the Permanent Court of International Justice is excellent. The book may confidently be recommended as an introduction to the study which will afford sure guidance.

A characteristic example of a refined jurisprudence is presented by the elaborate investigation by Dr. Nathan Feinberg of the jurisdiction of the Permanent Court of International Justice under the mandatory system.[1] In point of fact the only case which has yet arisen under which the jurisdiction of the Court has been invoked is the well-known Mavromattis affair, but unquestionably the elaborate judgments therein delivered afford considerable guidance in attempting to determine the force of the clause inserted in all the mandates authorizing recourse to the Court in the event of disputes. Of the many possibilities arising from this clause ably discussed by the writer it must suffice to note one or two of the more important conclusions. He is doubtless right in urging that the only way in which the Council of the League could obtain a decision of the Court on any point of difference between it and the mandatory would be by recourse to an advisory judgment. This implies that it would not be proper for a member of the League to seek to use its rights under the clause as a representative of the Council, and that its power is restricted to intervention when the interests of its own nationals are menaced. A power in this way is denied the right to appeal to the Court in defence of the rights of the natives, unless injury inflicted on them by a mandatory State can be shown also to affect adversely the nationals of the complaining State. The interests which a State may defend by application to the Court are doubtless wide, and it is quite possible that the author is right in contending that it would be legitimate for a State which, like Poland, has within its borders a large Jewish population to apply to the Court for a ruling on the carrying out of the British mandate for Palestine, though it may be observed that in such an event the Court could hardly avoid being confronted with the grave problem[2] whether the mandate is valid in view of the terms of the League Covenant which forbid any action contrary to its terms. It is also legitimate to suggest (pp. 214–19) that those States which have accepted the obligatory jurisdiction of the Permanent Court under the Optional Clause have thus added to their obligations to refer issues affecting their mandated territories to the Court, and that the existing clauses in the mandates are supplemented by the new obligation, and do not exclude its operation. Of other questions touched on it must suffice to note the discussion in chapter xv of the rules of interpretation of mandates and the validity of the proposal to distinguish between the rules applicable to bilateral treaties, to be regarded as akin to contracts, and multilateral treaties, to be assimilated in interpretation to laws. On this as on other matters of difficulty the author is both cautious and logical in his attitude.

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[1] *La Juridiction de la Cour Permanente de Justice Internationale dans le Système des Mandats.* (Paris: Rousseau, 1930.) Pp. 238. Price 40 frs.

[2] P. Crabitès, *Can. Bar. Rev.*, viii. 479–82.

Sirdar D. K. Sen, Legal Adviser to the Patiala State, whose ruler is Chancellor of the Chamber of Princes, has set out in an interesting manner the claims of the Princes as regards their relations to the Crown and the government of India.[1] His standpoint is largely that made familiar by Sir Leslie Scott and his colleagues,[2] and a very careful effort is made to overthrow the conclusions of the Indian States Committee (pp. 198–213). Issue is taken with the essential doctrine of the Committee that, when the East India Company came into relations with them, the Indian States were not possessed of the position in international law of sovereign independent States. It must, however, be doubted whether the contentions of the writer really meet the case. International law can hardly be regarded as something existing apart from its definite adoption, and there is no ground for holding that the rules of European international law were known to or accepted by the Indian States at the end of the eighteenth and beginning of the nineteenth centuries. In lieu there was prevalent in India a doctrine of its own, that of the supremacy of the Mughal Empire, tempered by the claims of Maratha supremacy and the growing authority of the Sikh kingdom. Indian thought did not envisage a number of equal independent States, but the subordination of States to a central authority, and in the early days of the Company it was perfectly content, like the other States, to derive its power from Imperial grants. It is perfectly true that, as it developed strength, it refused to pay tribute to the Emperor, and gradually it did away piecemeal with the formal tokens of its inferiority, such as the striking of coinage with the Imperial effigy or the use of phraseology implying subordination, but the real supremacy of the Company was achieved only with the extinction of the titular Emperor's position, as a result of his participation in the Sepoy revolt. The Crown then became unquestionably possessed of paramount power in India, and the grant of adoption sanads to the Indian princes, who eagerly accepted them, marks both the possession and the recognition of paramount authority. That Indian States such as Hyderabad were in practice independent of the Emperor is very true, but none the less their rulers sought recognition of their accession from the Emperor and in formal ways willingly conceded his primacy and their dependence; the assumption of the royal style in Oudh on the instigation of Lord Hastings was generally reprobated by Indian opinion. It is clearly too late at the present day, when the doctrine of paramount power has so long prevailed in practice, to demand that the treaties of the East India Company should be interpreted literally. The princes have by prolonged acquiescence homologated the British view that the treaties are to be interpreted in the light of paramount power, and Lord Reading's famous pronouncement in the affair with Hyderabad is not an exercise of unjust power but a simple statement of fact. It is useless to cite dicta even of Dalhousie, implying that international law principles were applicable to the relations of the Company and the States, as relevant to the issue of the position of the Crown, for the Crown came to control India with the additional claim to the paramount power of the Mughals. Or, put in another way, even accepting for the sake of argument the view that international law applies—a fact which the Government of India absolutely denied in 1891 in the Manipur case without eliciting any rejoinder—it is clear that the old treaties have been rendered obsolete by the change of events, and on the maxim *rebus sic stantibus* [1] could not be insisted upon by the States. It must, however, be added that the discussion is largely academic, for the actual conclusions of the States Committee are hardly seriously open to exception. The contention that the relations of the States are with the Crown is of course indisputable, but it does not carry us far. How the Crown is to exercise its rights *vis-à-vis* the States is a matter on which the States cannot dictate to the Crown. There is no legal claim that the Crown should not be advised by British ministers to regulate its relations according to the wishes of a responsible government in India. The claim that the British Government should retain control is a moral one, which happily has been endorsed by the Indian States Committee, though not homologated by Indian opinion outside the States, and the whole issue may be solved by an Indian federation.

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[1] *The Indian States.* (London: Sweet & Maxwell, 1930.) Pp. xii + 234. Price 10*s*. net.

[2] Cf. D. B. Somervell, *B.Y.I.L.*, 1930, pp. 55–62. Contrast Sir W. S. Holdsworthy, *L.Q.R.* xlvi. 407–68.

A. BERRIEDALE KEITH.

THE DOCTRINE OF *ULTRA VIRES*.

THIS important addition to legal literature [2] is based upon Mr. Seward Brice's well-known work on the same subject only in the sense that the author has taken his predecessor's line of thought for guidance. Mr. Street has produced a wholly admirable book for the practitioner, but the subject is one which is of great interest to students of jurisprudence, and it is perhaps permissible in this *Journal* to express a regret that "under instructions" he has omitted American decisions with but one solitary exception. In England the fifty-five-years'-old decision in *Riche* v. *Ashbury Railway Carriage Co.* stands in the way of the development of the law on the lines it has taken in America. In the Dominions the law is much as it is in England, but the case-law even of the Dominions has been relegated by Mr. Street to a very useful and exhaustive appendix. It is not fair to criticize an author for not achieving that which he did not set out to achieve, but Mr. Street shows himself so well equipped to write a work on the subject in its larger juristic and comparative aspects that we cannot but regret that he has not been more ambitious. Mr. Street, in his preface, is apologetic because the historical method has not been entirely avoided. He has no need to be apologetic, for his historical treatment of the subjects with which he deals in this way is admirably clear and succinct (*e.g.* pp. 12–22, 93–7, 260–7).

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[1] Wheaton, *op. cit.* i. 516–18; Sir J. F. Williams, *Am. Journ. Int. Law*, xxii. 89–104; Brierly, *Law of Nations*, pp. 168–75.

[2] *A Treatise on the Doctrine of Ultra Vires.* By Howard A. Street. (London: Sweet & Maxwell, Ltd., 1930.) Pp. lxxxviii + 591. Price £2 10s. net.

It is obviously impossible within the compass of a review to discuss many of the interesting problems with which Mr. Street deals. The most important of all is perhaps that of the liability of corporations for tort, and this appears to be Mr. Street's own view (cf. pp. iv–vi). Upon this subject in our view he is an extremist. He is a strong opponent of corporate personality. " A corporation," he says (cf. p. 4), " is commonly styled a ' legal person,' but the appellation ' person ' is applicable to it only by analogy ; and the analogy fails when it is thus clearly stated that this legal person is wanting in much that belongs to a natural person," and again (at p. 257), " without strain on the imagination it is impossible to conceive a tortfeasor or a criminal without some sort of physical attributes." He evidently hopes (p. 267) that one day the current will run back and that corporations will no longer be held liable for the fraud of their agents. " Is vicarious fraud," he asks, " more firmly established than was legal fraud before *Derry* v. *Peek* ? " And whilst treating thereof he appears to be guilty of a slip in thinking that the defendants in *Lloyd* v. *Grace, Smith & Co.* were a corporation—a slip of which Lord Haldane was also apparently guilty in *Percy* v. *Glasgow Corporation.*

Mr. Street, however, attempts a reconciliation of corporate liability for torts with the " true doctrine " (p. 256) of *Ashbury Railway Carriage Co.* v. *Riche.* " This reconciliation, real or apparent," he says (p. 259), " has been effected by adjustment of the law of agency." In order to effect this reconciliation he relies upon a secondary sense of *ultra vires*, meaning " outside the special privileges " of the corporation (pp. 8–9), whilst rejecting the secondary meaning attributed to the phrase by Blackburn J. in *Taylor* v. *Chichester and Midhurst Rly. Co.*[1] He then enunciates (p. 259) the following proposition.

" Provided that the act complained of be within the general scope of its constating instruments, though the injury caused incidentally or consequentially or owing to the manner of the doing of such act may not have been contemplated by the said instruments, and provided that the act be not absolutely *ultra vires*, a corporation may be sued in respect of all torts committed by its servants or agents acting with authority express or implied, and may be indicted for any crime in which criminal intent is not a necessary element."

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[1] Cf. now Viscount Sumner in *Hole* v. *Garnsley*, [1930], A.C. at p. 492.

The reconciliation here is certainly at most apparent and not real. Mr. Street himself sees (p. 264) that the proposition is not logically consistent with the " true doctrine." Mr. Street has narrowed to the utmost possible extent the effect of the decisions of the courts on this subject, and even so the result is not logically consistent. He is driven to regard (p. 265) *Campbell* v. *Paddington Corporation* as wrongly decided, a conclusion to which Mr. Goodhart has also come[1] and *Brownlow* v. *Metropolitan Board of Works, Harker* v. *Britannic Assurance Society, Percy* v. *Glasgow Corporation,* a dictum of Atkin L. J. in *Mackenzie-Kennedy* v. *Air Council* and several decisions in the Dominion (cited at p. 522), all seem to point to a wider extension of corporate liability.

Mr. Street curtly dismisses (p. 258) the view of corporate liability, perhaps put forward most persuasively as to English law by Sir John Salmond,[2] without reference to that distinguished jurist, and he also ignores the interesting suggestions of Mr. Winn in 3 *Cambridge Law Journal* 399, which is the more surprising, as in general he is well abreast of the literature of his topic. Mr. Street, however, gives a very fair statement (pp. 261–3) of the reasons which have induced the courts to take a line of which he disapproves and which he endeavours to explain away. He justifies (pp. vi, 262) the strict view of *ultra vires* on grounds of public policy in that the personal liability of governing bodies and directors would make them more cautious. Mr. Goodhart holds the same view.[3] But for our part we are of opinion that Sir William Holdsworth is right when he says that practical convenience rather than theoretical considerations has determined what activities are possible and what are impossible to a corporation.[4] This is not the only case in which English law takes a different line in different connexions: for example, in the law of torts gross negligence is merely negligence " with the addition of a vituperative epithet," whilst in the law of crime and of contract negligence will sometimes only involve liability if it be gross. Hewart L. C. J. put the common-sense point of view with vigour in *Harker* v. *Britannic Assurance* Co., [1928] 1 K.B. 766 (incidentally, why does Mr. Street only give the reference in the *Times Law Reports* ?) :

" The effect of the argument is that, because a company cannot lawfully insure a child for a sum beyond the statutory limit, it commits no offence if it grants such an insurance unlawfully. It is an entertaining argument. It seems to involve the proposition that a person cannot effectively commit an offence which is forbidden by law because the law steps in to prevent his act from being completed, or, at any rate, from being undisturbed. Unfortunately, the law cannot always prevent the commission of offences. Sometimes it has to punish the offender. In my opinion, if a company purports to insure a child for a sum beyond the limit, it commits an offence under the Statute, and none the less because it may also be perpetrating a gross fraud upon the assured."

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[1] 2 Camb. L.J. 362–3.

[2] *Torts,* 6th ed., pp. 65–7.

[3] *Loc. cit.,* pp. 362–3.

[4] *History of English Law,* ix, 52.

And in this Branson J. concurred.

It is not only in this connexion that Mr. Street presses the logical application of the doctrine of *ultra vires* farther than the courts have been willing to carry it. Hence we find many criticisms of decisions which bear testimony to the keen critical ability which Mr. Street has brought to the performance of his task. It would be almost true to say that Mr. Street has touched on nothing which he has not made interesting. As further illustrations of his independence of judgment and analytic ability combined with a respectful acceptance of authority we may instance his treatment of the following topics: the application of the doctrine to chartered corporations (pp. 18–22), unsealed agreements (pp. 95–101), discount shares (pp. 207–11), the payment of dividends out of capital (pp. 231–40), the liability of directors to the corporation and to third parties (pp. 294–320) and estoppel (pp. 400–4). His treatment of the rules in the following cases shows the same qualities: *Allen* v. *Gold Reefs of West Africa*, *Taylor* v. *Chichester etc. Rly. Co.*, *Ayers* v. *South Australian Banking Co.*, *Garrard* v. *James*, *Royal British Bank* v. *Turquand*, *Foss* v. *Harbottle* and *Sinclair* v. *Brougham.*

Part VII, consisting of some eighty pages, deals with the analogous doctrine affecting non-sovereign legislatures, and should be of value to students of the constitutional law of our Empire.

We have a few points which might be considered by Mr. Street for a second edition or, better still, for that more ambitious work which he has proved himself so eminently qualified to undertake. At p. 26 we should like some consideration of (or at any rate reference to) the late Professor Geldart's articles on Trade Unions and to Mr. A. L. Goodhart's pamphlet on the Legality of the General Strike, and at pp. 105–8 a consideration of the treatment of the difficult questions raised by *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.* by Sir John Miles and Professor Brierly in the 17th Edition of *Anson's Contracts*, by Mr. E. C. S. Wade in 44 *Law Quarterly Review* 51, and by Professor Chafee in 41 *Harvard Law Review* 945. Can it rightly be said that an *obiter dictum* of Atkin L. J. in conflict with that of Bankes L. J. in the same case "over-ruled" two earlier decisions (p. 259, note)? The reference to Robinson's Public Authorities should have come rather on p. 260 than on p. 522. On p. 94 there might be a reference to *R.* v. *Bigg*, 3 P.Wms. 419; 2 East P.C. 882.

The following misprints (which are remarkably few) may be noted. P. 96, l. 11, "Lawf*u*rd." P. 108 *n.*(*d*) . . . the case referred to is *R.* v. *L.C.C.*, *ex pte Swan and Edgar.* P. 149, l. 13, does not show where the quotation ends. P. 270 *n.*(*c*), "Mou*n*sell." P. 526, l. 1, "Pea*r*se."

W. T. S. Stallybrass.

THE DIVORCE OF FOREIGNERS IN FRANCE.[1]

THIS book will be very useful to foreign lawyers in France who have to advise their own countrymen about the possibility of obtaining a divorce there. The author, a member of the Bars of the United States, England and Spain, is a doctor of laws of the University of Paris, and he has made a detailed study of a subject upon which no previous text-book exists either in French or in English. The proof-reading leaves much to be desired, and it would not be difficult to point out slips in expression. But in spite of some faults, to the comparative lawyer the book has a special interest as being a study of a branch of French law from the point of view of a lawyer trained in the common law.

Most Americans enjoy at home what seem to us to be extremely wide facilities for divorce, and statistics show that they avail themselves freely of their opportunities. According to the figures for 1922, which Dr. Bates borrows from a German writer, the ratio of divorce in France was 70·4 per hundred thousand inhabitants as compared with 135·4 in America, 59·6 in Germany and 6·8 in England.[2] But in spite of their domestic privileges quite a considerable number of Americans have in recent years found it convenient to apply to French courts to obtain a divorce. Some three hundred American couples were divorced in France in 1926, and the author says, " France has become the divorce Mecca for aliens, particularly for fashionable Americans." This is due in part to the relative ease of satisfying a French court as to domicile and in part to the remarkably liberal interpretation given by the French courts to the term *injures graves* as a ground of divorce.

France offers so many attractions as a place of residence that it is in no way surprising to find colonies of foreigners settled there, and there are considerable British and American colonies, particularly in Paris. But how many of these foreign residents have the *animus manendi* which the English law requires for domicile ? Probably not a large proportion. Many of these migrants enjoy spending a part of every year in France, and some of them may reside there all through the year, but we should suspect that not very many have the intention of staying there for good and all.

If a husband and wife formerly domiciled abroad resided in England, and either of them petitioned for a divorce there, the court would decline jurisdiction unless it was satisfied that the husband had abandoned his former domicile and was living in England with the intention of making that country his permanent home. French courts are less strict in this regard. The law as to foreigners acquiring a domicile in France has been complicated by the fact that until recently it was possible for a foreigner to obtain a *décret* authorizing him to fix his domicile in France. This made it necessary for French writers to distinguish between a domicile so obtained, which they styled *domicile de droit* and a domicile acquired solely by residence and intention, which was designated as *domicile de fait.* But it had long been pretty well settled that French courts might find themselves competent to grant a divorce when the husband had merely a *domicile de fait* in France.[1]

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[1] *The Divorce and Separation of Aliens in France.* By Lindell Theodore Bates. (New York: Columbia University Press; London: Mr. Humphrey Milford, Oxford University Press, 1929.) Pp. 334. Price 35*s*. net.

[2] Rosenberg, *Ehescheidung und Eheanfechtung*, 1926, p. 121.

The recent law as to French nationality (*loi 10 août 1927*) has abolished admission to domicile by decree, and it would seem that foreigners may now acquire a legal domicile in France.[2] But, however this may be, it is certain that French courts in many cases find sufficient evidence of domicile in facts which would not satisfy an English court. MM. Pillet and Niboyet point out that this difference of view between the English and the French laws as to the meaning of domicile often leads French courts to apply the French law as a result of finding that there is a *renvoi* by the English law when no such *renvoi* really exists. The English law may be that the matter is governed by the law of the domicile of the parties, but the parties in this case have not a domicile in France in the English sense of domicile.[3] And in the famous Gould case stated by Dr. Bates the courts of New York held it established that the spouses who had been divorced in France had not at the time of the divorce lost their New York domicile. It is something of a shock to find that the French divorce was, notwithstanding, recognized.

The whole subject of the competence of French courts in regard to the divorce of foreigners is dealt with in this book very clearly and fully. Another striking peculiarity of French law is that in cases as to the divorce or separation of foreign spouses the French courts by no means always apply the French law *simpliciter*. They pay a certain regard to the national law of the spouses. *E.g.*, if by their national law no divorce is recognized, the French court will not divorce them nor will it divorce spouses for a ground which their national law does not admit. The rule seems to be that the facts must amount to grounds of divorce both in the French and in the national law. But this rule is difficult to apply and the decisions are not always clear or consistent with one another.

F. P. W.

TERRITORIAL WATERS.

THIS book[4] was originally published at Havana under the title of *El Mar Territorial*, and a noticeable awkwardness of English style is probably due to an unduly literal rendering of the Spanish text. The American Institute of International Law undertook to prepare draft conventions upon the three subjects recently selected for codification by the League, and Judge Bustamente was asked to prepare the draft upon the question of territorial waters. The present volume is the result of his labours. In the first part the learned author briefly reviews the history of the problem, and from this he passes on to discuss the various projects, official and unofficial, for a codification of the law. To most readers the chief interest will lie in the third part, which is in substance a commentary upon the draft convention drawn up by Judge Bustamente himself. The full text of this draft is given in the final chapter.

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[1] See Dalloz, *Répertoire Pratique, vo. Séparation de Corps*, nos. 221, *seq.*

[2] See article by M. Jules Valéry in *Clunet*, 1928, p. 592.

[3] *Manuel de Droit International Privé*, p. 521.

[4] *The Territorial Sea.* By Antonio Sanchez de Bustamente y Sirven. (Oxford: University Press, New York, 1930.) Pp. xxii + 175.

Since the book was written the Codification Conference has met and dispersed without achieving any substantial measure of agreement. The differences proved to be fundamental, nor does it seem likely that they will be resolved within any limit of time that we can foresee. Wisdom born of the event now enables us to realize that Judge Bustamente underrated the practical difficulties of the problem, and it is clear that his own draft would have had no chance of general acceptance. For example, Great Britain, Japan, and the United States, together with many other States, are adamantine in their insistence upon the three-mile limit, and the countries which uphold this rule control about 80 per cent. of the world's maritime tonnage. Judge Bustamente's draft convention proposes compulsory arbitration of all cases in which other States claim a wider limit of territorial waters. Disputes upon such a question are among those which are clearly excluded by the British reservations to the Optional Clause, and it is not to be expected that this country would submit such a vital issue of policy to the hazards of an arbitration in which the actual decision would probably turn upon the personnel of the tribunal. Of the fifteen judges now on the Permanent Court six come from countries which demand a six-mile limit, and three of the other States represented claim an "adjacent zone" beyond the three-mile limit, in which certain rights may be exercised. Upon this essential matter it is clear that formal codification is still remote ; meanwhile the rule of the three-mile limit is enforced in practice by the steady insistence of the chief maritime States.

To the learned author "universal codification" appears as "the crowning ideal of all such matters," and this view is widely held among the Latin-American publicists whom he so ably represents. That being so, it is greatly to be regretted that none of the Latin-American governments returned any reply to the questionnaire of the League Codification Committee upon the subject of territorial waters. The proceedings at The Hague showed that these States were agreed in their demand for a six-mile limit, and timely recognition of this fact would have made it clear that any general conference was foredoomed to failure. But the Conference will not have been wholly a waste of time if it has taught us that agreement upon the substance of international law must be obtained before we can begin to set about improving its form.

As Judge Bustamente rightly points out, agreement upon the fundamental question of the extent of territorial waters is essential to any convention that is to be of practical value, and for this reason the present review does not seek to follow the learned author in his discussion of various subsidiary problems. Upon many of these questions his views will command a wide measure of agreement, and all students of international law will welcome his intervention in the discussion.

H. A. S.

AMERICAN TRIALS.[1]

In the series of "American Trials" begun by these two volumes it is "intended to present the most interesting cases of American history from official records" with an introduction to reconstruct each background. Most American trials of any legal importance have an interest for English lawyers, for in the United States there is English law, even if it is English law that speaks with an American accent.

During the Civil War the conduct of the Federal Government was often essentially unconstitutional. *Inter arma silent leges*, but the Judiciary when opportunity offered propounded true constitutional doctrine. One such opportunity was found in *Milligan's Case*. This decision, and especially the judgment of Justice Davis, gives the American version of the sound Common Law principle that within the constitution civil liberties are to be safeguarded in civil war as well as in peace time, and that the civil courts can call to account all other tribunals. In various parts of the North and North-west there were sympathizers with the South, and the more ardent formed some of those secret societies whose mummery has always had a strange fascination for many Americans. The largest of these was called the "Sons of Liberty," and undoubtedly the Society was actively anti-Federal. A prominent member in Indiana was Lambdin P. Milligan, a lawyer who was not and never had been in military service. In October 1864 he with others was arrested in Indiana on charges of "conspiring against the Government of the United States, affording aid and comfort to the enemy, inciting insurrection and violating the laws of war." At the time of his arrest the State of Indiana was in no way the seat of war, the State and Federal Courts were open and martial law had not been declared. Milligan was tried by a military commission, found guilty and sentenced to death. President Andrew Johnson confirmed the sentence, saying that "treason must be made odious." A petition was filed claiming a writ of *habeas corpus* and release on the ground that the Military Commission had no jurisdiction to try and sentence Milligan. The Circuit Court of Indiana differed and the petition came before the Supreme Court, being reported as *ex parte Milligan*.[2] After full argument, before nine Justices of the Supreme Court, it was held unanimously that on the facts stated the Military Commission had no jurisdiction over Milligan and his discharge was ordered. There was, however, a division of opinion as to the grounds of the decision. Some months later considered judgments were delivered. The majority of the Court, five in number, held that not even Congress, still less the Executive, could authorize the trial of a civilian by martial law or a military court. The doctrine laid down by Justice Davis is broadly that "at no time can it be rightly said that the Constitution is not the supreme law of the land and the suspension of any of its provisions in war as in peace can rightly occur only by virtue of express limitation set forth in it." The operation of the civil courts cannot be suspended by the President or by Congress. "Only the paralysis of the system can suspend its operation." With the modifications required by the existence of a rigid constitution and a legislature with limited powers, this U.S. doctrine of the basis of martial law is exactly the English doctrine of immediate necessity as set out by Dicey. The minority of four judges, led by Chase, the Chief Justice, while agreeing as to the Executive, held that Congress had the power—which in this case had not been exercised—to authorize a military commission such as that which tried Milligan. "When the nation is involved in war and some portions of the country are invaded and all are exposed to invasion, it is within the power of Congress to determine in what States such public danger exists as justifies the authorization of military tribunals for the trial of crimes . . . against the public safety." This minority view *mutatis mutandis* resembles the dicta of Lord Halsbury C. in the Privy Council cases *ex parte D. F. Marais*[1] and *Tilonko v. Attorney-General of Natal*,[2] some of which are *obiter* and of doubtful authority. In England nowadays the old principles relating to martial law and to the position of the Executive generally are being challenged, nor does the law seem fixed and certain in the United States. In time of war hysteria may capture even courts. Indeed, American authority of eminence has predicted that if subjected to the strain of actual war the decision in *ex parte Milligan* would be disregarded. It may even be doubted whether the decision would have been the same had judgment been given in 1863 instead of in 1866. These are speculations, but at any rate constitutional lawyers on both sides of the Atlantic will welcome a record of the proceedings in this historic case so complete as to include a full report of the trial before the Military Commission, the arguments of counsel before the Supreme Court, and the majority and minority judgments, prefaced by an informing Introduction and adorned with portraits of the judges and counsel engaged.

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[1] *The Milligan Case*, edited by Samuel Klaus of the New York Bar. (London: George Routledge & Sons, Ltd.) Pp. 476. Price 15*s*. net.

The Molineux Case, edited by Samuel Klaus. (London: George Routledge & Sons, Ltd.) Pp. x + 409. Price 15*s*. net.

[2] 4 Wallace 2.

The second of these volumes is less important. It recounts the history of a notorious trial which excited the United States some thirty years ago, but its interest is human rather than legal. Was Roland Molineux, the son of a respected Civil War veteran, General Molineux, guilty or not guilty of the murder of a Mrs. Adams? She died on December 27, 1898, of cyanide of mercury poisoning, after taking a dose of bromo-seltzer. This medicine, with other articles, had been sent through the post, presumably as a Christmas present, to one Cornish and by him given, in good faith, to Mrs. Adams at whose house he lodged. Molineux had quarrelled with Cornish, his handwriting resembled that on the fatal postal package, and there was evidence against him along other lines. He was tried, convicted and sentenced to death. An appeal on various points of law was lodged and the Court of Appeals of New York quashed the conviction and ordered a new trial—which it may be noted the English Court of Criminal Appeal cannot do. The second trial resulted in the acquittal of Molineux and the case remains an unsolved mystery.

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[1] [1902] A.C. 109.

[2] [1907] A.C. 93.

Mr. Klaus's admirable, if slightly *staccato*, Introduction and the detailed record of the trial introduce us to a number of unpleasant people and none more unpleasant than Molineux himself, to the Yellow Press in some of its worst aspects, to a thoroughly unjudicial judge, to a political and party atmosphere strangely out of place in a murder trial and to proceedings protracted over nearly four years.

The case raises at least one legal point of importance. To prove that Molineux was guilty of the murder of Mrs. Adams the prosecution must show that he was the sender of the poisoned dose to Cornish. To this end evidence was tendered and admitted that in October 1898 a certain Henry C. Barnett had received a packet of medicinal powders through the post, had died after taking a dose, and that the accused had reasons for disliking him. This evidence without doubt had great weight with the jury. Although there were others, the main ground of the appeal, reported as *People v. Molineux*,[1] was that this evidence was in law inadmissible. The Court by a majority adopted this view, and sent back the case for retrial. In practice, in the United States, says the learned editor, this decision has "long been substantially disregarded and the case would never be decided as it was if its facts should be presented again." It may be noted that Wigmore on Evidence[2] cites and discusses the case without challenging the decision, but thinks that in *Shaffner v. Com.*,[3] a very similar case, "the conclusion reached is perhaps a strained one." In England the common law rule adopted by the Court of Appeals in the *Molineux Case*, and which has saved many a criminal and a few innocent men from conviction, still stands as a principle. It is not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct to commit the offence for which he is being tried. In reality, however, a multitude of cases from *R. v. Geering*[4] to *R. v. Armstrong*[5] have made such inroads upon the rule that there is little left of it. The courts nowadays are

[1] 168 N.Y. 264.

[2] 2nd edn., vol. i, p. 676.

[3] (1872) 72 Pa. 60.

[4] (1849) 18 L.J.M.C. 215.

[5] [1922] 16 Cr. App. 149.

much more ready than formerly to admit evidence of "similar facts" under one or other of the various exceptions to the common law rule—to prove motive, intent, system, or identity, or to negative accident or mistake. The English Court of Criminal Appeal would almost certainly now hold the evidence excluded in the *Molineux Case* to be admissible. In this matter legal relevancy is overtaking logical relevancy.

A. E. W. HAZEL.

COMMERCIAL LAW OF 'IRAQ AND PALESTINE.

IT has hitherto been a matter of some considerable difficulty to ascertain the present position of Commercial law in 'Iraq, and Judge Hooper's volume [1] will be welcomed both by lawyers and men of business. The law in force in 'Iraq is the Ottoman Commercial Code of pre-war times, which has been carefully translated by the learned author, who has also prefaced each of the several chapters of the code by an explanatory note. Particular attention should be directed to the warning given by him as to the peculiarities of the judicial system of 'Iraq, which render litigation in its courts a matter of even greater uncertainty than elsewhere. So much of the book as relates to the law of Palestine would appear to be obsolete now, owing to the fact that since the book was written the Palestinian Government has enacted a measure which virtually brings the Imperial Bills of Exchange Act, 1882, into force in its territory. This does not, however, detract in any way from the value of Judge Hooper's work in filling a gap in our knowledge of the law of the Near East, and the thanks of the commercial world are due to him for the very able manner in which he has carried out his self-imposed task.

H. C. G.

BRITISH POLICY AND CANADA, 1774–1791.[2]

THE latest addition to the series of Imperial Studies being published by the Royal Empire Society is singularly opportune at the present time when economic problems are taking an important share in the developments of the relations of the different parts of the Empire. The book is chiefly concerned with the progress of trade policy in the new British Empire after the loss of the American colonies. The effect of American independence was to turn Britain's eyes definitely in the direction of Canada, where the prospects to the English Board of Trade seemed hopeful. Even in those days the English Government was anxious to obtain supplies from British dominions rather than from foreign countries. Mr. Graham has written an interesting chapter in the history of the Empire with care and full reference to original sources of information as well as printed works, which are tabulated in an excellent bibliography.

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[1] *The Commercial Law of 'Iraq and Palestine.* By His Hon. Judge Hooper, President of the Court of First Instance, Basra, 'Iraq, 1929. (The Times Publishing Co. Ltd., Baghdad.) Pp. i–vi + 1–227.

[2] By Gerald S. Graham. (London; Longmans, Green & Co.) 10*s.* 6*d.*

FRENCH PRIVATE INTERNATIONAL LAW.[1]

IN a Latin dedication to his native Auvergne Professor Bartin suggests a similarity between the sharp peaks of that striking country and the *apices juris* with which his book is concerned. It is a work earnestly to be recommended to foreign students of French Private International law.

In this first volume M. Bartin lays down his general plan and deals with the general theory of conflicts of laws and conflicts of jurisdiction and with the international effects of judgments.

The Introduction explains the scope and the sources of the subject. In M. Bartin's view it covers two matters and two only—conflicts of laws and conflicts of jurisdiction, *forum* and *jus*.

Is the French court competent to deal with the particular case and, if so, is it to apply the French law or another ?

Accordingly, he declines to admit the subject of nationality. Upon this matter there is never any question of choice of laws. In a French court the French law and the French law alone must decide whether the person whose nationality is disputed is or is not a French national. Nationality is a matter of public not of private law, and each State fixes who are its nationals as it fixes what are its frontiers. It may happen that French law claims as a national a person who is also claimed as such by another State. But when this occurs the French law prevails in the French court and no attention is paid to the foreign law.

Nor will M. Bartin admit as part of private international law those conflicts of laws which arise within the bosom of a single State when certain sections of the community are governed as to certain matters by different laws. Conflicts of this kind were familiar in France before codification, and are so still in Egypt and some other countries. They are studied with special knowledge in the work of M. Arminjon reviewed in a previous number of this *Journal*.[2] M. Bartin does not deny that these non-international conflicts offer many analogies nor that the conflicts in old France between the different *coutumes* played a considerable part in the development of the rules of private international law. But for reasons which it would take too long to state here, he thinks the decisions upon conflicts of this kind are unsafe as precedents and he limits his inquiry to conflicts of *sovereignty*. And here it may be said that French private international law thus limited and defined is to all intents and purposes as much judge-made law as is the private international law which is applied in our own courts. The fragmentary and imperfect rules stated in a few articles of the codes carry us only a very short way. The body of the law which fills this book has been built up bit by bit by the labours of the French judges. Many of the main principles are now firmly settled, and, speaking broadly, their agreement with those of our law is striking. Sometimes there are instructive differences in the application of these principles. For example, it is a principle of French private international law that its rules as to conflict of laws apply only *vis-à-vis* of a civilized State. The application by a French court of a foreign law presupposes that this is the law of a State whose legislation is based on certain fundamental ideas which are common to those which underlie the French law itself. *S'il y a une différence trop grande entre les institutions que ses législations ont établies et les institutions de l'Etat dans lequel on les invoque, la règle ne joue plus* (p. 57).

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[1] Bartin, E., *Principes de Droit International Privé selon la Loi et la Jurisprudence Françaises*. (Paris: *Editions Domat—Montchrestien*, 1930.) Pp. 634. Price 48 frs. 75 c.

[2] Third series, vol. ix, pt. iv, p. 274.

The same broad principle is a part of the law of England.[1] But how is it to be applied say to Soviet Russia? If the Russian Government by a general law confiscates private property without compensation, will a foreign court recognize the validity of the proceeding? In England the Court of Appeal answers this in the affirmative. "The English courts will not inquire into the validity of acts done by a recognized foreign government against its own subjects in respect of property situate in its own territory."[2]

But in France the Court of Appeal of Aix decides otherwise in an *arrêt* of which M. Bartin approves warmly. A State which is based on the denial of private property is separated by too great a gulf to be admitted within the circle in which the French rules of conflict of laws are applied. *Le décret de nationalisation soviétique des biens en Russie . . . est une confiscation pure et simple, un coup de force de l'Etat contre l'individu, ayant pour but selon les termes mêmes de la Constitution de l'U.R.S.S., d'abolir la propriété privée et d'établir la dictature du prolétariat: une pareille legislation heurte les bases mêmes de tout l'édifice juridique français qui repose sur le respect de la propriété et de l'inviolabilité des droits qu'elle engendre et ne peut recevoir, devant une juridiction française, aucune application directe ou indirecte.* The *Chambre des Requêtes* rejected the *pourvoi* or, as we should say, the appeal was dismissed.[3]

And, be it observed, this decision is after the official recognition of the Soviets by the French Government.

M. Bartin is a wholehearted opponent of the *renvoi—le lawn-tennis du droit international* in the phrase of M. Buzzatti. M. Bartin's criticism of this famous theory deserves the most serious consideration. After twenty-five years of discussion the French jurisprudence is still conflicting (p. 201).

Space does not allow us to notice other features of this most valuable book. Our rigid system of the authority of precedents has many practical advantages. But one of its drawbacks is that once a point of law has been settled the books rarely examine the reasons for it. In France where the law is more fluid this is otherwise, and in this book every topic is discussed with an acuteness which all readers must admire. All those who have studied this volume will be anxious to have the second and concluding volume in their hands.

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[1] See Dicey, *Conflict of Laws*, 4th ed., p. 19.

[2] *Princess Paley Olga* v. *Weisz*, [1929] 1 K.B. 718.

[3] *Aix*, 23 *décembre* 1925, Clunet, 1926, 667, et *Req.* 5 *mars* 1928, Clunet 1928, 674, cited by M. Bartin at p. 63.

F. P. W.

COMPARATIVE LAW OF PUBLIC ADMINISTRATION.

This is the third instalment [1] of Professor Neumeyer's magisterial treatise on the comparative law of public administration. The opening chapters deal with such matters as postal regulations, the law of weights and measures, of the calendar and public holidays. But the greater part of the volume is taken up by a detailed study of the monetary laws of the different countries, and of the various legal problems which have arisen as the result of the devalorization of currency on the Continent, and the violent fluctuations in rates of exchange. It is impossible not to admire the marvellous industry and patience of the learned author, and to praise the all-embracing completeness of his work. Nothing appears to have escaped his attention ; for instance, it is somewhat startling to an English lawyer to find in these pages a full discussion of the relevant English statutes and case-law, as contrasted with the corresponding law of the continent. This is a work which may be regarded as indispensable not merely to comparative lawyers, but also to serious students of Private International Law, as the various problems which arise are discussed in the light of their relation to the conflict of laws. The documentation of the text is amazingly complete, and the book is valuable, not only as a clear and reasoned exposition of an extremely complicated and difficult subject, but also as a storehouse of citations and references which will very much lighten the labours of those who may follow hereafter along the trail which has been blazed for them by Professor Neumeyer. The congratulations which are due to the learned author for his remarkable achievement will be all the more cordial when it is realized that this book represents a goodly portion of his life-work.

H. C. G.

COMPARATIVE LAW OF MARRIAGE AND BETROTHAL.

In these two pamphlets [2] Dr. Kauschansky covers a wide range of topics relating to the comparative law of marriage and betrothal. The first, which deals with the Jewish law, is a summary of the rules which govern the duty of a husband to maintain his wife and family. The second pamphlet is a more ambitious effort, as the author endeavours within the limits of some 80 pages to cover the principles of the law of marriage throughout Europe, including the law of the Union of Soviet Republics. His views on the policy which should underlie a rational system of marriage law are not such as would be likely to meet with general approval, but his defence of certain of the Soviet laws is not without some degree of cogency, especially when he emphasizes the fact that many of the defects of the existing European marriage laws are due solely to a blind adherence to tradition, without any real regard to ethical or religious considerations. The footnotes appear to be of value, as Dr. Kauschansky has given copious references to the various legislative measures dealing with the celebration and dissolution of marriage in the different European countries.

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[1] *Internationales Verwaltungsrecht*, vol. iii. By Dr. Karl Neumeyer, Professor of Private International Law in the University of Munich (J. Schweitzer Verlag, München). Pp. i–vi + 1–390.

[2] *Die Unterhaltspflicht der Ehegatten nach biblischem talmudischem und rabbinischem Recht.*

Das europäische Eherecht, seine Reform, Unifizierung und Sozialisierung in den bürgerlichen Staaten und Sowjetrussland.

H. C. G.

SOVIET MARITIME LAW.

THIS is the latest work[1] dealing with the Maritime Codes of the Union of Soviet Republics, and it includes both a translation of the Codes and an exposition of the principles of Soviet Maritime Law as a whole. The author, who is a well-known Berlin barrister, has traced the development of the law from the date of the Russian revolution, emphasizing in particular the steps which have been taken in the endeavour to reconcile the needs of Russian overseas commerce with the principles of Marxian economics. In this way a reader obtains a glimpse of the curious and highly ingenious methods of the Soviet law-givers. This little volume has more than an academic interest, as it brings into relief the peculiarities of the Soviet Maritime Codes, which have to be taken into account in all commercial dealings with Russia at the present time.

H. C. G.

UNDUE ENRICHMENT.

ONE of the most interesting problems which arise in connexion with the comparative study of Anglo-American and Continental law is that which is presented by the question whether there is anything in the Common Law systems equivalent to the "*action d'enrichissement*" of French law, and the corresponding cause of action in other Continental systems, which is based on the liability of a person who has made an unjustifiable gain to refund the proceeds to the person at whose expense he has profited. So far as the present reviewer is aware the comparison has not yet been made from the angle of view of the Common Law, but we have in this monograph[2] by one of the very able members of the new school of comparative lawyers which is springing up in Germany under the ægis

[1] *Das Seeschiffahrtsrecht der Sowjetunion.* By Dr. Heinrich Freund, 1930. (Stuttgart: Ferdinand Enke. Pp. 160.)

[2] *Die Bereicherungshaftung.* By Dr. Wolfgang Friedmann, 1930. (Walter de Gruyter, Berlin.)

of the Berlin Institute of Foreign Law, a very cogent and well-reasoned argument in support of the contention that in the main the principle of "undue enrichment" is accepted by all modern systems, *e.g.* the English action for money had and received. This is a matter which will have to be cleared up sooner or later, as it is of definite practical importance in connexion with certain aspects of the unification of the law of bills of exchange: *e.g.* where the drawer of a bill escapes liability solely by reason of the failure of the holder to protest the bill on dishonour, is he to be entitled to retain the consideration which he received from the holder for the endorsement? Anglo-American law says, Yes! Continental law replies in the negative! Which of these two views is to prevail? This and similar problems are discussed in detail with great lucidity by Dr. Friedmann in this valuable contribution to our knowledge of the subject.

H. C. G.

GERMAN CRIMINAL LAW.

THE first volume of Professor von Hippel's treatise on German Criminal Law, which was published in 1925, dealt with the theoretical aspects of the repression of crime, and with the historical development of criminal law in the various European countries. The second volume [1] is devoted to the exposition of the general principles of German criminal law. It would almost be an impertinence to praise this work, which is destined to be one of the classics of German legal literature, but an English lawyer may perhaps be permitted to express his admiration of the depth of learning which it displays. The method adopted by the author differs essentially from that employed by Anglo-American writers on this branch of the law. Taking the German Criminal Code as a background, he analyses the law of crime into its constituent elements, viz.—the act, its illegality, the responsibility of the actor, and of his accomplices, and punishment. He concludes with an examination of the rules governing the question of the limitation of criminal liability by lapse of time, and the exercise of the prerogative of mercy. This is a method of treatment which is rather bewildering to an English reader, who is accustomed to a discussion of the law of crime under separate headings, each of which deals with a particular type of criminal offence. His difficulties will also be enhanced by the fact that German lawyers employ many legal concepts which are unfamiliar to us, as, for instance, when they distinguish between *Idealkonkurrenz* and *Realkonkurrenz*. But he will learn much from these pages, especially from the fifth chapter, where the question of responsibility is discussed in great detail and with remarkable acumen. Judged by intellectual standards, this is an outstanding work, which should, if possible, enhance the already high reputation of its author.

H. C. G.

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[1] *Deutsches Strafrecht.* By Professor Robert von Hippel of the University of Göttingen. 2nd vol., 1930. (Berlin: Julius Springer. Pp. i–xxxiv + 1–584.)

ENGLISH-GERMAN AND GERMAN-ENGLISH DICTIONARY OF LEGAL AND BUSINESS TERMS.[1]

THIS is a useful book which reflects credit on the industry of its author, but it by no means fills the gap. The author tells us that she has had seven years' experience as interpreter before the German-English Mixed Arbitral Tribunal, and in that capacity has had to study the legal and business terminology of the two countries. No doubt she has an excellent knowledge of both languages, and most of the translations are good. In some cases, however, she fails for want of legal knowledge. A German lawyer who wants to know the meaning of *nisi prius* will not be much helped by being told that it is *eine Klage vor dem High Court.* And, if he does not know the meaning of equity, he will not be greatly wiser by being told that it is *Billigkeitsrecht.* A good many of the translations, in fact, in default of any explanation, would leave an inquirer pretty much in the dark.

We think also that the author makes a mistake in including a lot of words which are not technical. Anyone who wishes to find the German for " strangle " or " archbishop " has other dictionaries at his disposal. But it is perhaps rather unfair to expect too much, and we ought to be grateful for a book which will give us at any rate the equivalent *word* in ninety-nine cases out of a hundred. Anyone who has tried to translate German legal terms into English will know how difficult it is. In such matters as bills of exchange, bills of lading and insurance policies it is generally possible to find precise equivalents. But in other branches of law we have often to fall back on paraphrases and explanations. Now that the study of English law is being pursued with such ardour in Germany there is much need of a scientific work on a larger scale. It would, probably, be best done by collaboration between lawyers of the two countries. Such a scheme might well be taken up by one of the " Institutes for the Study of Foreign Laws." But this is not to disparage Miss von Beseler's book, which for many people will be very convenient.

F. P. W.

COMPARATIVE LAW OF ASSOCIATIONS.

THE study of comparative law is gaining ground, though somewhat slowly, in the Italian Universities, largely as the result of the efforts of a few enthusiastic and devoted scholars, amongst whom one might mention Professor Sarfatti, of Turin, Professor Mario Rotondi, of Pavia, and Professor Galgano, of the Istituto di Studi Legislativi of Rome. The University of Pavia has founded, at the instance of Professor Rotondi, an Institute of Comparative Commercial Law, and this volume[2] is the first of a series of monographs on commercial law which will be continued under the ægis of the Institute. It deals with a matter which has not yet received the attention which it merits, namely the comparative law of associations. Incidentally it also illustrates the growing influence on the development of Italian law of German legal theory. The summary of the early history of the law of partnership is the most interesting portion of the book to an English reader. H. C. G.

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[1] *Englisch-Deutsches und Deutsch-Englisches Wörterbuch der Rechts- und Geschäftssprache.* By Dora von Beseler. (Berlin: Gruyter & Co.) Pp. 223. Price 10 RM.

[2] *L'Associazione in Partecipazione.* By Dr. Oscar Caroselli, 1930. (Istituto di diritto commerciale comparato, Pavia.)

ITALIAN COLONIAL LAW.

Italian Colonial Law is now a subject which forms part of the curriculum in several of the Universities of Italy, and this book[1] has been written primarily for the use of teachers and students, though the requirements of other readers have not been disregarded. Up to the present the literature relating to this topic was voluminous, but was scattered over such a large number of publications, chiefly of an official character, that it has been a task of some difficulty to acquire any accurate knowledge of the principles on which Italian colonial legislation is based. Professor Cucinotta has therefore undertaken the duty of reducing this mass of material into a systematic form, so as to render it available to the general reader. The first part deals with the sources of the colonial law and with the colonial judicial system, whilst the second part is in reality an exposition of the colonial law of public administration. The law of the Italian colonies consists in part of Italian law applicable to Europeans (and in certain cases also to natives), and in part of native customary law. This has led to a very complicated situation because of the difficulty of applying Italian law to colonial conditions and of reconciling many of the native customs with the doctrine of "*ordre public*" and with the provisions of a decree of February 7, 1926, which subjected these customs to a further test, namely that of "compliance with the spirit of Italian legislation and civilization." The result has been that much has to be left to the discretion of the colonial judges, and the principle has taken root that judicial precedents are to be regarded as binding, in spite of the express provisions of the Italian law to the contrary effect. It appears to be doubtful, however, whether this "case law" system, which is based on a decree of April 15, 1917, is entitled to recognition at the present day in view of subsequent legislation, though apparently it is still in force, owing to the necessity of adapting the provisions of the Italian Codes to conditions which were not contemplated by the codifiers. Of particular interest to an English reader are those portions of this book which deal with the application of Italian criminal law to the punishment of offences committed by natives, and with the difficult problem of the organization of native labour. This book may be regarded as a valuable contribution to legal knowledge, as it throws light on what has hitherto been a very obscure topic. H. C. G.

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[1] *Istituzioni di Diritto Coloniale Italiano.* By Professor E. Cucinotta, 1930. (Istituto Coloniale Fascista, Rome). Pp. 1–422.

NATURE OF A BILL OF EXCHANGE.

In certain continental legal systems, notably that of Germany, the liability of any party to a bill of exchange is deemed to be the result of an unilateral act. It therefore follows that this liability is independent of any contractual relationship between drawer, acceptor and endorsers. The signature of each party, in other words, creates an obligation which can be enforced by the holder of the bill, not because he is the transferee of a contractual right, as in English law, but quite independently of any contractual right. This theory of the nature of a bill of exchange has given rise, amongst other questions, to a controversy as to the effect on the liability of a signatory of what an English lawyer would term a plea of *non est factum*. In this able and interesting treatise[1] Professor Mossa, who is one of the leading Italian authorities on Commercial law, examines this question, and discusses it in the light of recent German legal theory.

H. C. G.

LABOUR PROBLEMS.

This little brochure[2] contains the speeches delivered by Senator de Michelis at the 14th Session of the International Labour Conference at Geneva. The last speech will be of interest to English readers, as it constitutes a vigorous defence of the policy of the Fascist Regime in Italy with regard to labour problems.

We have also to acknowledge:[3]

The Canons of International Law. By T. Baty, D.C.L., LL.D. (London: John Murray.) Pp. xii + 518. Price 21*s.* net.

Maine's Ancient Law. New Edition by Sir Frederick Pollock, Bart., LL.D., D.C.L. (London: John Murray.) Pp. xxiv + 440. Price 10*s.* 6*d.* net.

Salmond's Jurisprudence. Eighth Edition by C. A. W. Manning. (London: Sweet & Maxwell, Ltd.) Pp. xviii + 580. Price 20*s.* net.

Pitt Cobbett's Cases on International Law. Vol. I, Peace. Fifth Edition by Francis Temple Grey, M.A. (London: Sweet & Maxwell, Ltd.) Pp. xx + 372. Price 17*s.* 6*d.* net.

Foreign Law Series. No. 1. *Taxation as it Affects the doing of Business Abroad in England, France, Germany, U.S.A.* (London: Sweet & Maxwell, Ltd.) Pp. 226. Price 7*s.* 6*d.*

[1] *La Dichiarazione Cambiaria.* By Professor Lorenzo Mossa, of the University of Pisa, 1930. (Annali delle Università Toscane.)

[2] *Questioni Economiche, Politiche e Sociali nella Organizzazione Internazionale del Lavoro.* By Giuseppe De Michelis, 1930. (Stabilimento Carlo Colombo, Rome.) Pp. 30.

[3] Mention here does not preclude a later review.

In Quest of Justice. By Claud Mullins. (London: John Murray.) Pp. xvi + 448. Price 12*s*. net.

The South as a Conscious Minority, 1789–1861. By Jesse T. Carpenter, Ph.D. (The New York University Press.) Pp. x + 315. Price $4.50.

The Law of Insolvency in British India. Tagore Law Lectures, 1929. By Sir Dinshah Fardunji Mulla. (Bombay: James & Co.) Pp. lxvii + 933. Price Rs.12 net.

Classics of International Law. *Quaestionum Juris Publici Libri Duo.* By Cornelius Van Bynkershoek. 2 Vols. (London: Humphrey Milford.) Price 30*s*. net.

The Law of Civil Procedure of 'Iraq and Palestine. By C. A. Hooper. (Basra: The Times Printing and Publishing Co. Ltd.) Pp. vi + 209.

Transactions of the Grotius Society. Vol. XV. (London: Sweet & Maxwell, Ltd.) Pp. xxiii + 171. Price 10*s*. net.

The following periodicals are also received: American Bar Association Journal; American Journal of International Law; American Political Science Review; Aperçu Statistique du Commerce Extérieur de la République Tchécoslovaque; Bolletino della Emigrazione; Bulletin de la Société italienne pour les Études de Droit industriel; Bulletin officiel du Congo Belge; Bulletin statistique de la République Tchécoslovaque; Calcutta Weekly Notes; Canadian Bar Review; Chinese Social and Political Science Review; Columbia Law Review; L'Egypte Contemporaine; Gesetzgebung und Rechtspraxis des Auslandes; Gold Coast Review; Headway; Hindustan Review; International Labour Office Bulletin; International Labour Review; International Review of Agricultural Economics; International Year Book of Agricultural Legislation; Journal du Droit International (Clunet); Journal of the Parliaments of the Empire; Juridical Review; La Giustizia Penale; La Procedura Penale Italiana; Law Quarterly Review; League of Nations Journal; Madras Law Journal; National Municipal Review; New York University Law Quarterly Review; Rapports Judiciaires de Quebec; Revista de Ciencia Juridicas y Sociales; Revista de derecho jurisprudentia; Revista de Identificacion y Ciencias penales; Revue de Droit International et de Législation Comparée; Revue Internationale de la Croix Rouge; Revue Internationale de l'Enfant; Social Sciences Quarterly; South African Law Journal; Studi di Diritto Industriale; University of Illinois Studies in the Social Sciences; Wisconsin Law Review.

THE FUTURE OF PRIZE LAW AND THE FREEDOM OF THE SEAS.

[*Contributed by* T. BATY, ESQ., D.C.L., LL.D., *of the Inner Temple, London, Barrister-at-Law. Formerly Secretary, International Law Association.*]

Neutral Trade in War—Then and Now.—The War of 1914 has again provided an illustration of the over-mastering desire of the belligerent to destroy his enemy's trade and of the incompatibility of this desire with the immunity of neutral commerce.

It did not last long enough to witness the development of an Armed Neutrality, and the world-wide character of the struggle has also militated against such a phenomenon. But it is a plain fact that whether under the plea of reprisals, or by a sweeping extension of the category and destination of contraband, the Declaration of Paris has been nullified. Or, if the mind revolts from this as an abstract proposition, let us say merely that neutral commerce has practically been put under far greater embarrassments than existed for it prior to that Declaration of 1856.

It would seem incontrovertible that the position of the neutral was much more favourable then :—

1. Enemy property being confiscable, there was no irresistible temptation to enlarge the definition of contraband.
2. There was no confiscation for carriage of contraband : much less for carriage of conditional contraband.
3. There was no breaking of bulk without judicial warrant, and the evidence of captors was not received.
4. The trade of neutral ports was sacred, except in enemy goods.

The New Practice and the Future.—The most disquieting and dangerous feature about the change which has thus been sustained in the position of neutral commerce is that it would certainly not have been permitted on its merits.[1] If a weak nation had insisted that the existence of railways in Turkey must render a blockade of Turkish ports ineffective unless it should be allowed to overhaul at its pleasure the traffic of all the ports of Southern Europe, is it credible that the nations would have recognized the pretension? Would two respectable South American states which quarrelled have been allowed to interfere with all the traffic of the Atlantic? Of course not: and they might have held forth on the inefficiency to which their blockades were thereby reduced as long as they pleased, without producing the slightest result. Can anybody suppose that Britain would submit to be "rationed" by the United States?

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[1] Prof. van Houten, in *Recueil des Rapports, Organisation Centrale pour une Paix Durable*, iii, p. 59, observes, " It would, I think, be highly improbable that France, Russia, Italy or Japan should admit as law against themselves what England now practises."

Similarly with articles of innocent commerce. No power would have submitted to a general interdiction of its commerce with Peru or Greece in soap and machinery and chemicals simply because Chile chose to go to war with either country. And so again with reprisals. Britain, France or Italy would certainly have refused to be the butt of them.

But a generous handle has now been given to all belligerents, however insignificant. No nation can decently decline to allow another to do what it has done itself. If it does, it simply outlaws itself, and disclaims the authority of international law. Great Britain cannot afford, and does not desire, to do that. We shall have the concurrence of every generous mind in the words of the Law Officers (Harding and Cairns) in 1858: "Great Britain can put forward no claim, and can make no demand, which she is not prepared to concede to Naples or to any other recognized Government, however weak or barbarous."[1]

We are therefore faced with a situation in which, on the outbreak of war, there are theoretically no limits which can be placed on interference with neutral trade. Formerly, we had a free sea in the sense that if a ship was on a straight course for a neutral port, or was bound for a belligerent port with goods not actually specialized for battle, she was safe. Also, her cargo (unless enemy property) was safe, unless going to a military or naval port, where it might be taken and paid for.

Now we have no such security.

Railways.—The whole rationale of the change is ascribed to the introduction of railroads. But railroads existed in 1864: yet Lord Russell was emphatic against the innovations then. Certain transits were always easy, before the introduction of railroads, and it was argued that to permit them would destroy the efficiency of certain blockades—yet Lord Stowell refused to recognize that the fact gave any right of interference with the freedom of neutral ports.[1] "I cannot admit," he said in the *Luna*, "that because the port of San Sebastian borders on ports which are blockaded, that . . . it is less accessible than any other open port. The introduction of such a principle would have the effect of stretching out the limits of every blockade to an indefinite extent." It is absurd to talk as though blockade amounted to a kind of hermetic seal, which railways have dissolved. It never did. It amounted to a grave and considerable embarrassment, and it must always amount to that. Calculations of less or more are out of place in this connexion. Lord Stowell refused to consider San Sebastian blockaded, though in absolute contiguity with French soil. "To do so would be to stretch out every blockade to an indefinite extent." As the same great judge said in the *Ocean*: "If the exportation of goods from Rotterdam was at this time permitted, it could in no degree be vitiated by a previous inland transmission of them from the [blockaded] city of Amsterdam"—and in the *Stert* (where it was argued that to permit Amsterdam to import by inland navigation would put an end to the efficacy of the blockade of that city altogether), "If that is the consequence, all that can be said is that it is a necessary consequence." Evidently, Scott did not consider that the exigencies of local conditions enabled belligerents to wrest the law to suit geography. If a town was difficult to isolate it was not a reason for allowing neighbouring neutrals to be damaged, but for pursuing some other resource of civilization.

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[1] Opinion in the *Cagliari* case, Brit. State Papers, xlviii, p. 468.

If some measure were proposed in order to counteract the influence of railways, it certainly need not have taken the form of controlling the entire commerce of neighbouring neutral nations, That, it will be admitted, was to assume a new power which went far beyond correcting the deviation due to the introduction of railways, and amounted to dictatorial interference of a wide and indefinite kind. The influence of railways—costly, congested and open to belligerent interruption as they are in wartime—is much more than offset by the enormous increase in efficiency of the cruiser against the merchantman which modern improvements have brought about. Why should not the neutral, with as much justice, claim, that if the precise amount of interference with the enemy's commerce which obtained in 1800 is to be the unalterable standard for all time, no cruiser shall be allowed to interfere with more than one neutral vessel *per diem*? Lord Kingsford, the most eminent prize judge of post-Napoleonic times, declared in Parliament that the possibilities of effective blockade "had been very much altered by the introduction of steam, as two or three steam vessels might now be as effective as twenty sailing vessels had formerly been."[1] And this was in an era of railways.

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[1] The *Ocean*, 3 C.R. 297 (1801). The *Luna*, Edw. 190. The *Stert*, 4 C.R. 66. See also the *F. Ilsabe*, *ibid*. 64. The *Imina Baumann*, 3 C.R. 167.

Declaration of Paris.—The fact is, principles are independent of calculations. There is no rule that interference with enemy commerce must always attain a certain degree of effectiveness. If blockades and interferences with contraband are less effective than they were, then the only safe conclusion is that blockade and contraband are not such useful weapons of war as they used to be: not that neutrals may be subjected to new, arbitrary and hitherto unlawful restrictions.

It remains true, however, that belligerents keenly feel that the powers of blockade and contraband are not enough. The real remedy for this state of affairs is the frank dissolution of the Declaration of Paris (which has produced far more interruption to neutral trade than it was expected to prevent), and the reversion to the practice of confiscating the enemy's goods. It may be that the true line of progress is the entire freedom of private property at sea. Events have shown that this will scarcely be conceded. When war is effectually abolished, but not very much before that, the commerce of the enemy may hope for immunity. The proclamation of immunity will be evaded in one way or another, and the last state of the neutral under such arbitrary and irregular measures will be worse than the first. The obvious remedy is to go back to the pre-Declaration era. The capture of private property was not given up in the interests of belligerents—otherwise it would have been given up in all cases; even when the cargo was on an enemy ship. It was given up as a concession to the neutral carrying trade, and has proved a fatal gift. If the old system is reverted to, the neutral carrying trade may be adversely affected, but the neutral's own trade will be restored to security. Contraband would, of course, be strictly limited to articles specialized for war.

"Armed Populations"—1915 and 1793.—The extent to which the position may have been modified by railways on the one hand, and fast cruisers on the other, may be a subject for investigation—

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[1] Hansard, May 26, 1861.

but certainly not for precipitate and arbitrary action. Nor is the argument (urged particularly with reference to the extension of contraband to fuel, chemicals, food, clothing and other non-specialized goods), that the whole population of the enemy country is swept into the prosecution of the war, of any avail. Exactly the same argument was urged in 1793: it was said that corn for France must be captured because all France was doing its utmost for the success of the war. Count Bernstorff had no difficulty in demolishing this argument. A nation at war always depends on the efforts and support of its population.

A Fair Compromise.—The neutral, then, may very fairly offer the belligerent the repeal of the Declaration of Paris, accepting in return the abandonment of the doctrine of continuous voyage and of the swollen lists of contraband articles. Blockade remains out of the discussion. The proceedings against Germany popularly called blockade have nothing to do with the juridical institution. They rest on reprisals and contraband. It is absurd to suppose a Baltic port blockaded, when free access can be had to it from Stockholm and Copenhagen. Contraband is the crux of the whole situation; and if a further makeweight was considered necessary, in the interests of belligerents, it might not be impossible that neutrals should undertake to prevent the export of contraband, and to accept the novel idea that the carriage of contraband in bulk entails confiscation of the ship—though, let it be repeated, this must clearly be conditional on the definition of contraband being severely limited—in Stowell's days, even the contraband articles themselves, if of the innocent description, were only subjected to pre-emption. Much less were the ships condemned.

Invasions of Neutral Rights as to Evidence.—In proposing such a compromise, the neutral would be claiming nothing but what is well-established justice.

The Lee-Murray Report of 1753 (the "*Réponse sans Réplique*") is universally accepted as an accurate statement of the necessary principles of prize procedure. It states these as established by the Law of Nations "universally and immemorially" received. Is the universal and immemorial to be swept away by a dubious change in circumstances? Are the objective, practical safeguards of the law so received to be supplanted by the arbitrary guesses at intention which are in favour at the present moment? Is the neutral to be put to proof of his innocence, and to stake a deposit of £150 on his success? It is emphatically believed *not*—it is, on the contrary, submitted that the present are ephemeral heresies held as a result of confused thought.

They derive entirely from Chief Justice Chase, and the three or four decisions in which his casting-vote overruled Justice Nelson, who really knew the principles of prize law well.

Essentially, they pivoted on replacing facts by surmises. Story, in 1816, had spoken of the destination of goods as conclusive of their contraband character. He used the word " destination " as meaning " place of discharge as proved by legal evidence." Chase caught at the word, and interpreted it as " intended place of ultimate delivery." The way was thus open to strike at any cargo, on plausible allegations of improper intention. And, be it noted, Chase was not actuated by any notion of improving the law of contraband in order to counter the regrettable innovation of railways. Railways did not enter his thoughts at all—there were not many railways at Matamoras; nor, in spite of recent engineering feats, did any viaducts span the Gulf of Mexico between Nassau and New Orleans!

The learned Chief Justice believed himself to be applying Lord Stowell's law; not improving it. But a considerable practical difficulty stood in his way, which is well shown by Twiss to be fundamental.[1] The only admissible evidence in Prize is that which comes from the ship's papers and people. And without evidence of his own, the captor cannot establish his suspicions. It will therefore not surprise the reader that Chase broke this invariable rule, and that the British Prize Court Rules of 1898 and 1914 broke it too.[2]

For the first time in history, in 1914, a British Prize Court acted in clear opposition to " the rule universally and immemorially received," and listened to the evidence of captors. It is probable that no Machiavellian astuteness lay behind this attempt to emancipate the court from the law. It was probably a mere example of the common lawyer's inability to realize that prize law and common law proceed upon totally different principles.

It is difficult to get persons trained in the common law to realize that prize law and procedure are totally unlike the law and procedure to which they are accustomed. The capturing state is judge and prosecutor both, and it is unreasonable that it should be witness as well. The neutral is at a great disadvantage in the matter of

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Law Magazine and Review, 1877, p. 1 (reprinted in *Prize Law and Continuous Voyage*, Stevens & Haynes, London, 1915, *q.v.*).

[2] *Prize Rules*, 1914, O. xv. r. 2(6) (*d*).

language and practical convenience: exculpatory evidence is very difficult to adduce. For these reasons,[1] prize procedure does not resemble the tournament of wits and cross-swearing which a common-law trial exhibits. Capture is a violent interference with an independent neutral flag. As such, it must be justified up to the hilt. The evidence of the ship's own papers and the ship's own people must of itself show the contraband quality of the voyage and cargo.

"Then," says the common lawyer, "false papers and false swearing will always be at hand to defeat the captor."

If it were so, it would be a necessary consequence of the simplicity and swiftness of prize proceedings.[2] But it is not so. Ignorant seamen, examined separately, are sure to say something which will be inconsistent with an untrue tale. "Papers" does not mean manifests and logs only, but every scrap of writing that can be found on board. A double set of every letter and note would scarcely be provided by the most cautious contrabandist. Reference to the folio records of Prize Appeals in the Inner Temple Library will show very clearly how the truth was established from the proper, or "primary," evidence.

Then again, this evidence had to be perfect and consistent. Any discrepancies or omissions were, *prima facie*, fatal. In practice, the court would often indulge a claimant with liberty to explain them away by "further proof." But the cases of the *Glierktigeit*, (1805) 6 C.R. p. 58 n., the *Haabet* (*Giertsen*), *ibid.*, p. 54, and the *Leucade* show the impropriety of allowing captors such liberty to adduce extraneous evidence. It would reduce a prize trial to the level of an ordinary case of balancing conflicting evidence, in circumstances where this is peculiarly costly and difficult. The neutral ought to bear no expense. If his papers are regular and his sworn accounts agree in minute detail without prevarication, he ought not to be put to the costs and uncertainties of trial in a strange country. If there is anything wrong with them, it is a different matter.

Does this seem to the candid mind an unreasonable position? On the contrary, it is perfectly reasonable and practical.

It is this mode of trial which the Lee-Murray Memorandum calls "immemorial" and "universal," and which it states to have been adopted during the then last war by Great Britain, France[1] and Spain, and to have been applied to all captures at sea, immemorially, by every country in Europe.

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[1] See *Britain and Sea Law* (T. Baty), G. Bell, London, 1912, pp. 60 *seq.*

[2] It was formerly regarded as essential that claims should be adjudicated on within three tides. This was altered to a year and a day.

And " any other mode of trial," according to this most authoritative statement, " would be manifestly unjust, absurd and impracticable." Indeed, since Story (see Pratt's *Story*, p. 17) lays it down that the evidence in prize cases is " of the very essence " of Prize Jurisdiction, it is difficult to dispute the conclusion that all the cases decided since the British Act of 1907 on captors' evidence and without the examinations *in preparatorio* are devoid of all force and validity. They might safely be disregarded by third parties, if Story's clear opinion is to go for anything.

> " The moment," says Evarts, " you depart from this vital principle . . . you subject neutral commerce to the unchecked and speculative cupidity of captors, and to the delays and miscarriages of *visitation and search in court* for suspicion, and of remote and crippled litigation to establish guilt or innocence by imported or extraneous evidence ; which neutrals never have submitted to, and never can tolerate. . . . The practical maintenance of this great safeguard of neutral commerce against speculative capture . . . is secured by the firm and undeviating rule of the prize courts never to admit further proof as part of the original inquiry . . . but always to introduce it, if at all, for a resolution of the difficulties which the primary evidence itself raises."[2]

Marriott, who was Advocate-General, and was to be Judge, in the Admiralty Court, expressed the true principles of proceeding against the ships and goods of independent foreign countries very clearly in the celebrated *Mémoire Justificatif de la conduite de la Grande Bretagne en arrêtant les navires Etrangères et les munitions de guerre destinées aux insurgens de l'Amérique*, published at London in 1779. He prefixes the motto—" *Ex ore tuo te judicabo*," as expressive of the procedure.

" Dans le cas," he proceeds, " de *l'Hendric et Alida*, Milord Mulgrave ayant trouvé à bord, des pavillons anglois, demande au maître d'où venoient ces pavillons, et pourquoi il les avoit. Klok repondit que ces pavillons étoient dans le dit vaisseau lorsque les propriétaires en firent l'acquisition. Nous n'avons cependant pas permis l'examen personel de Milord Mulgrave." And he says why : " Le témoignage des capteurs n'est admis dans ces procédures que dans les cas singuliers, tels que seroient le défaut de témoignage de la part de l'équipage du vaisseau saisi, leur fuite, ou le refus obstiné de subir un examen légal. Les Articles 2, 4, 5 de l'Ordonnance de la marine française (1681) portent la même exception.

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[1] See the Ordonnance de la Marine, 1681, which entirely bears out the statement.

[2] Brief in *Prize Law and Continuous Voyage* (ed. Baty, p. 26).

" Si les saisis confessent que le navire appartient aux ennemis, l'affaire est decidée. Mais s'ils laissent entrevoir des prévarications, ou qu'ils se contredisent—si le témoignage des papiers est en opposition aux témoignages rendues de vive voix ; si les documents ont été spoliés, submergés, brulés, dechirés ou detruits de quelque manière que ce soit ; si ces documents ne sont pas parfaitement clairs, ou portent l'empreinte de l'équivoque que l'on ne doit pas attendre d'un voyage de bonne foi ; voilà des soupçons graves : et ces défauts prenant leur source originelle dans la réclamation même, négligeante ou prévaricateur sont plus que suffisants en justice, pour qu'il soit condamné aux frais de procédure qu'il a occasionés quand même on lui rendroit le vaisseau et sa cargaison.

" Ces procédures s'accordent sans doute avec celles de la cour d'amirauté de Leurs Hautes Puissances."

Marriott adds that :

" Les capteurs que ne se seroient pas justifiés par le témoignage même des saisis, seroient condamnés aux frais et aux dédommagements, et même à des punitions graves."

The learned author observes that the judges would not permit the *Hero* privateer to adduce sworn declarations and documents proving beyond a doubt that the prize *Pandora* really belonged to British subjects trading to revolted Virginia : and that the evidence of tobacco experts proving that the tobacco on board was of American growth was equally rejected. Again, in the *Hendrick and Alida*, " although there was the strongest reason to think that by unloading there might be found the real ship's papers, and more contraband in boxes and barrels, not set down in the bills of lading and papers produced, yet Lord Mulgrave's counsel would not advise him to search the vessel to the keel. That can only be done in special cases, in the presence of public officials, and in others by an express commission of unlivery, ' un ordre exprès du juge,' who is bound to hear both sides on the point."

And he concludes : " It cannot be too often repeated that if, contrary to this rule, evidence is admitted from all quarters, cases, perjuries and frauds will never cease."

Marriott was no cosmopolitan sentimentalist. He was a thorough-going, even violent, supporter of belligerent rights. The most vigorous attack on the ideas and policies of the armed neutralities is said to be the work of his vitriolic pen. But he had a due sense of the probability that established rules were not made for nothing.

Lushington, in the *Aline and Fanny*,[1] as we have seen, and in the *Ostsee*,[2] is quite as emphatic on the exclusion of captor's evidence; and Phillimore is equally plain. Examination by the captor at his own hand, prior to suit, and the admission of captor's evidence, are clearly rank innovations in prize procedure.

We confess that to depart from the established system without the gravest international deliberation argues a levity which does not bode well for a settled international system in the future.

According to the modern innovation of 1914, abolishing the "preliminary examination" of the ship's company and substituting captors' prejudiced evidence, it becomes desirable to bring ships in, pending the making-out of a case against them. They are detained weeks or months. Nothing like that was possible under the proper practice. The evidence was clear and simple. The naval officer could judge whether it was adequate or not. If he thought he had made a good prize, he could bring the vessel in for judicial search and pronouncement, at the risk of costs if his suspicions were too far-fetched. His liability to pay costs personally was a useful check on his zeal; for the Government by no means invariably indemnified him. Now, on the contrary, the wretched neutral was asked by the new practice to deposit £150 as a condition of being allowed to try to prove his innocence!

Innovations in Contraband.—Twiss[3] saw in 1877 that the Chase doctrine of continuous voyage meant the arbitrary management by belligerents of all neutral commerce. Mr. Justice Nelson and three other senior colleagues of Chase saw it, and dissented from his doctrine. Hall saw it, and up to his latest edition[4] stigmatized the doctrine as a denaturalization of Stowell's theory and an exhibition of "unfortunate violence," and thought it would find no defenders even in America. Despagnet, in the 1910 edition by de Boeck of his standard work, repeats[5]:

"D'après cette théorie, la contrabande de guerre est saissible, même quand elle est réellement dirigée vers un port neutre, si l'on peut établir que, arrivée à sa destination, elle sera ultérieurement dirigée . . . vers un port ennemi. Cette manière de voir, repoussée par tous les publicistes européens, est condamnée par les raisons mêmes que nous avons déjà signalées à propos de la continuité de voyage appliquées au blocus."—The doctrine of continuity requires "clear proof," but that is no security, for "Ne peut-on soutenir que cette 'preuve évidente' de la fraude résulte de ce que la contrabande est dirigée vers le pays neutre qui sépare l'ennemi de la mer, et de cette présomption que, ce pays étant en paix et n'ayant nul besoin des objets de contrabande, ceux-ci sont certainement destinés au pays ennemi? Nous objecterons à cela:

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[1] Spinks' Reports, p. 322.

[2] 9 Moore's Privy Council Cases, 178.

[3] *Law Magazine and Review*, 1877, p. 1; reprinted in Baty, *Prize Law and Continuous Voyage* (London, 1915).

[4] *International Law*, ed. vi, p. 668.

[5] *Droit International Public*, pp. 1270–2, § 714.

"1. Que la saisie . . . ne peut être exercée que lorsque l'atteinte à sa sécurité est *certaine*, *i.e.* quand la contrabande est dirigée vers son adversaire, et non quand elle est un voyage vers un port neutre.

"2. Que la légitime défense ne peut se justifier pour la présomption d'une atteinte, que peut-être ne se produira pas.

"3. Que le système de la continuité du voyage permet de paralyser tout commerce . . . sous prétexte que, dirigés vers un port neutre, ils pourront être, de là, envoyés à l'ennemi. . . .

"Au point du vue doctrinal, la question demeure donc entière."

Pillet very sensibly observed in 1898[1] that, granted that you may confiscate articles of innocent use, but of prime necessity for a fleet or army, dispatched to the fleet itself, or the port occupied as the base of the army,[2] in every other conjuncture a doubt exists. It must be systematically resolved in favour of neutral trade, in order that it may not be systematically resolved against it. "Dans le cas où les merchandises sont à destination d'un port neutre, il faut décider qu'elles ne peuvent pas être confisquées. C'est sur ce point que les abus les plus criants se sont produits par l'adoption de la celèbre theorie de la continuité du voyage. D'après cette théorie, des marchandises en route pour un port neutre peuvent être saisies toutes les fois qu'on a des raisons de croire qu'elles doivent être transportées de là, chez un belligérant, soit sans transbordement soit après transbordement. . . .

"La théorie doit être absolument rejetée, car elle aboutit à faire disparaître toutes les garanties des puissances neutres contre l'arbitraire des belligérants. . . .

"L'interdiction de la contrabande n'a raison d'être que lorsque le commerçant est pris en flagrant délit de secours porté à l'ennemi, lors donc seulement qu'il a à son bord des marchandises à destination de l'ennemi ; c'est exclusivement dans ce cas que la saisie de la contrabande est légitime."

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[1] *Lois de la Guerre*, § 216.

[2] Which is all that Story and his colleagues *decided* in the *Commercen*.

As Pillet shows, the later cases of the *Doelwyk*, *General*, etc., are inconclusive. In the former, the goods (which after all were weapons) were in the event released on appeal on a technical point, and in the latter, compensation was paid by the United Kingdom for interference with German vessels (carrying alleged contraband for the Transvaal) going to a neutral port. Few authors, indeed, had expressly adopted the continuous voyage theory : none had done so with reference to *prima facie* innocent goods. Montague Bernard,[1] as well as Twiss and Hall, had disapproved of it, and this distinguished Oxford professor considered, like the present writer, that *Hobbs* v. *Henning* proved that it was rejected by the law of England.

" If England or France should hereafter be at war with Mexico, a vessel bound from New York to Mobile or Galveston might be carried into an English or French port on the ground that she had on board muskets or saddles, coats or boots "—not contemplating, the reader will notice, corn, cotton, or copper !—" destined for the Mexican army, and she would be at the mercy of any inferences which an English or French prize court might draw from the form of her papers or the character of her cargo." He adds (p. 310) that the case of the *Commercen* was not one of continuous voyage but of hostile assistance (as Dana also points out).

Selborne, the eminent Lord Chancellor, when Attorney-General, " quite concurred in the opinion " of Lord Cranworth and Earl Russell, that a vessel going to Nassau, intending afterwards to make another voyage, could not legally be captured on her way thither.[2] Earl Russell, indeed, demanded damages from the United States on account of the seizure of a British vessel bound for a neutral Mexican port, on the ground that—" It is clear that the vessel was seized upon a most erroneous notion of the international law applicable to the case, *viz.*, that he (the captor) had a right to look beyond the actual and immediate destination of the articles to a neutral port, and to consider what would probably become of them after they had reached their lawful destination in some further and future transaction.[3] The Prize Court at Key West had held the same language :

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[1] *British Neutrality*, p. 317.

[2] Hansard, Third Series, p. 173, col. 522.

[3] Brit. Parl. Papers (N. America), 1863, no. 12, p. 10.

"The vessel sailed from Halifax for Matamoras with a miscellaneous cargo, and while lying off the mouth of the Rio Grande, she was captured, in the act of discharging her cargo into lighters coming from the Mexican side of the river by the U.S. gunboat *Montgomery*, on the ground of having powder and percussion caps on board. That fact does not appear to warrant the capture and condemnation of the vessel or cargo . . . inasmuch as in a trade carried on between neutral nations and ports there can be no such thing as contraband of war." [1]

This was simply the sound doctrine of Sir W. Scott in the *Imina*.[2]

Lord Russell, Lord Derby and Lord Kimberley (the last of whom, as Mr. Wodehouse, had much diplomatic experience) were perfectly in accord with Lords Selborne and Cranworth. When Wodehouse criticized some expressions of Russell's as tending to imply "there might be a question as to whether a neutral vessel might not properly be captured, if the ulterior destination of goods conveyed to a neutral port after they had been landed was for a belligerent consumer"—Russell retorted—"No: nothing of the kind!" [3] And Lord Derby [4] laid it down that "If a vessel were proceeding *bona fide* from this country to Nassau, whatever might be the nature of her cargo, . . . and no matter what might be the ultimate intentions of her owners, . . . that would afford no justification for her seizure by an American cruiser previously to her entering the harbour of Nassau," to which Lord Russell replied that he had certainly been misunderstood if he had given the impression that a vessel going to Nassau intending afterwards to make another voyage might be captured on her way thither. What he had alluded to was "a case of simulated destination—that of a vessel pretending that she is going to Nassau, when she is in reality bound for another port."

The best justification of the doctrine of continuous voyage, indeed, is not the analogy of continuous colonial voyages (when the stoppage was always in the *last* stage), but the practice of capturing blockade-runners in the early stages of their voyage, or in disregard of their ostensible destination. It fails, because such captures as these[1] were never made on suspicion, however well grounded, if the vessel's course was regular, and consistent with her papers. A ship from Europe for Nassau, however certain it might be from the nature of cargo and consignee that she and it were going on together to Baltimore, could never have been condemned for violation of the blockade of that port. Were she to be found beyond Nassau, the case would be entirely different.[2]

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[1] Costs were refused, because the munitions were labelled "Codfish": The *Will-o'-the-Wisp*.

[2] 3 C.R. 167.

[3] Hansard, April 23, 1863, C. 571. Other passages worth careful attention are in *ibid.*, Third Series, vol. clxx, cols. 70, 754, 763, 759, 951, 980, 995, etc. etc.

[4] *Ibid.*, col. 1823.

From the citations of public statements by the most eminent statesmen and jurists, it will be seen that the doctrine of continuous voyage was flatly repudiated in Great Britain and France alike. No express or tacit assent to the doctrine was ever given.

But events are compulsive arguments. In the *Kim*,[3] in 1915, the late Sir S. T. Evans, concluding with John P. Robinson that "they didn't know everything down in Judee," or Europe, persuaded himself that the law had changed in spite of the almost unanimous opinion of jurists, and fortified himself by an invocation of Westlake and other authorities, most of whom were thinking of a strictly limited contraband list consisting of arms and ammunition only. But surely, to effect a change in the law, unanimity, or some approach to it, is a clear necessity. Where was the unanimity here?

In itself, however, the adoption of the doctrine of continuous voyage is a small thing. It is in connexion with the wide extension of the category of contraband articles that it becomes so serious, and amounts to a total interdiction of trade. Attempts to extend the category have often been made in the past, but never on so comprehensive and sweeping a scale. And the attempts were very successfully resisted. Sweden, in 1661, obtained from Britain the treaty concession that only a certain enumerated list of weapons and the like should be contraband: it has been argued that this list was not exhaustive, being introduced by the words "et specialiter"—but subsequent treaties of 1664 and 1665 show that no other articles than those expressed were meant to be included. "In the case where one of the powers shall find itself at war, commerce and navigation shall be free to the subjects of that power which shall not have taken any part in it, with the enemies of the other; and they shall consequently be at liberty to carry to them directly all the merchandizes which are not specially excepted by the second article of the Treaty concluded at London in 1661, and by virtue of this same article expressly declared prohibited or contraband, or which are not enemy's property." "And to the end that it may be known to all those who shall read these presents what are the merchandizes specially excepted and prohibited, or regarded as contraband, it has appeared fit to enumerate them here, according to the aforesaid Article XI of the Treaty of London. These merchandizes, specially designated, are the following" (enumerating the very restricted list contained in Art. XI of the Anglo-Swedish Treaty of 1661).[1]

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[1] See for instance the cases of the *Nancy*, the *Franklin* (*ibid.*, 217), the *James Cook*, Edw. 261. See also the *Star* (1801, 3 C.R. 193, n.)—Teneriffe to Hamburg, but taken entering Corunna; the *Phœnix* (1800, *ibid.*, p. 186)—Guadeloupe for Altona, but caught sailing so far south as Finisterre, with a Bordeaux pilot on board, and held bound for Bordeaux.

[2] On the whole subject of continuous voyage, see the pamphlets by Twiss, *The Doctrine of Continuous Voyage as applied to Contraband of War and Blockade*; Gessner, *The Case of the British Barque "Springbok"*; Rémy, *La Continuité des Voyages*; Chapter I of Baty's *International Law in S. Africa* (London, 1900). Two other rare tracts are reprinted in *Prize Law and Continuous Voyage*—Ewart's *Brief in the "Springbok" Case*, and D. C. L.'s *Analysis of the Judgement in the "Springbok" Case.*

[3] 1 P. Cas. 405.

And when provisions destined for France in 1793 were brought in and pre-empted at a cheap rate in England, Jay's treaty secured compensation for the American exporters. It is sometimes stated that the point of principle, whether provisions could ever be contraband, was left undecided: and so it was—but this is not a complete statement. In the ensuing arbitral commission, the Americans were awarded compensation by the umpire. The British Commissioners, Dr. John Nicholl and Mr. Jno. Anstey, rested the case for the contraband quality of provisions on a statement by Vattel, that provisions might be contraband where there was hope of reducing the enemy by famine. The American Commissioners, Christopher Gore and Wm. Pinkney (the celebrated advocate) argued that Vattel's statement, otherwise uncorroborated by other jurists, only related to the case of blockade; it was not superfluous, on that footing, because it enabled the blockade to dispense with the individual warning which continental practice required in the case of blockade.[2] Trumbull, without in terms adopting their contention, decided that the stoppage of provisions for France could not bring about the submission of France through famine. In effect, therefore, he held that provisions could only be contraband in the case of a regular siege of a circumscribed locality, where actual famine was relied on as the means of reduction. The mere cumulative effect produced by a shortage of provisions in a belligerent country is clearly not within his principle—for that was certainly the situation of France at the moment.

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[1] Wheaton's *Elements*, p. 482. Schlegel, *Visit of Neutral Vessels under Convoy* (London, 1801). These treaties were, of course, restored (along with all the other Anglo-Swedish treaties) in 1815, and ought to have been conclusive in favour of Sweden as to what could or could not be properly treated as contraband—especially provisions and metals.

Cf. the *Vier Gebroeders*, Burr, p. 159 (July 2, 1759), where a Dutch ship from Rochelle for Dunkirk with brandy and salt had her cargo condemned—because, "Dunkirk being blocked up at the time of the capture, the cargo thereby by its nature became contraband."

Gore's luminous opinion, delivered in 1797 (when the arbitral commission met in London), is worth reproducing in this connexion.

In the matter of the *Neptune*,[1] the ship had been going to Bordeaux with rice when she was captured. Prize proceedings were begun (it would be interesting to know whether condemnation was formally the object of the libel), and an order for sale to the Government made. The cargo-owner then put in a claim, and restitution was decreed of the cargo or its value. This was allowed only at the invoice value plus 10 per cent., and the owners claimed compensation, under the treaty, for the difference between this and the price current at Bordeaux. Trumbull as umpire adopted the opinion of Mr. Gore; both opinions are too valuable to be passed over: and it may be remarked that Nicholl and Anstey contented themselves with recording their dissent, without risking an appeal to reason.

But, without speaking of provisions, which are thus seen to be contraband only in such extraordinary circumstances as amount to the institution of a regular blockade, we may properly challenge the extension of the list of contraband from articles *specialized* for war to articles *useful* for war. It is surely incontrovertible that the old lists bore conspicuously on their face the mark of specialization. Such specialization was shown by the fact of their preponderant warlike use. In the *Carpenter*[2] it was stated that only about one-twentieth of the sulphur imported was used for powder, whereas saltpetre was almost exclusively so used: and the condemnation in Malta of a cargo of sulphur as contraband was reversed. If everything useful in war, or even necessary for war, were contraband,[3] then wood, iron, and tin would have been contraband, which was certainly never the case. Still more would lead have been such: yet only the primitive Anglo-Dutch Treaty of 1625 allows its inclusion. Some authorities, mainly French, insist on the specialization of the goods for war by some process of manufacture,[4] before they can be considered as contraband: and Bismarck, on this ground, declined to suppose that unmanufactured saltpetre could possibly come within that description. But it seems unnecessary to go so far. If imports of a raw material are almost entirely devoted to military use, as was the case with saltpetre, it is difficult to see why a military use should not be presumed for it. The great, and perhaps the valid, reason against allowing this is that such a rule would open an inquiry as to statistics of commercial and military practice which might give very misleading results. The argument in favour of it is that it is otherwise impossible to explain the frequent inclusion of saltpetre. Both the horse and the "villainous" saltpetre had in the battles of the seventeenth and eighteenth centuries a preponderant military flavour. But they were not manufactured.

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[1] Moore, *Int. Arbitration*, iv, p. 3844.

[2] 2 Acton II (1810).

[3] Except perhaps such things as horses, which need no process to render them immediately utilizable for fighting purposes.

[4] The *Ringen de Jacob*, 1 C.R. 89 (1798).

Applying these principles to the cases of copper and cotton, the "manufacture" test would at once rule the raw material out. The "specialization" test would give the same result: it cannot be said that, however useful copper and cotton may be in arsenals, they are of any use like horses on the tented field; nor can they be said to be entirely or in the main devoted to warlike uses, like saltpetre. High explosives and aeroplanes would stand in a different category, and might not unfairly be classed as contraband.

In our opinion, therefore, the raw ores and the cotton in bales, as well as the ingots and the woven cotton fabrics, are clearly outside the proper and ancient limits, universally recognized, of contraband. In the Napoleonic wars, copper was exceedingly important as material for sheathing ships, and tin had a great military importance as the material of canister shot.[1] But neither raw copper[1] nor crude tin was contraband; whilst copper sheets[2] ready for naval use, and tin plates such as are used for canistering shot, have been so treated. In no single treaty (except the almost prehistoric Anglo-Dutch one of 1631) has copper, as such, been conventionally regarded as contraband. Nor have any crude minerals, except bullion. And even tin plates were released in 1817 by a strong court, consisting of Grant, Scott and Russell.[3] We make no apology for reproducing a note of this important case, as it is nowhere reported: the papers in the cause are in a folio volume of prize appeals, formerly Dr. Lushington's, *penes* the Inner Temple (London), marked (1813–14).[4]

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[1] The *Rosine*, 2 C.R. 372.

[2] The *Concordia Affinitatis* (Hay & Marriott), p. 169; The *Charlotte*, 5 C.R. 275; The *Juffrow Anna Gedruth* (Hay & Marriott), p. 221.

[3] Baronet, ex-Chief Justice of Bengal.

[4] There are two volumes so numbered—this is the thicker.

The ship *Freden* was Swedish, ex-Gothenburg for Boston (then the American naval port—see pp. 12, 14, 15 of the record) with iron, steel, tin, alum and vitriol. The tin was in the form of "350 small casks German Tin Plates." She sailed in October 1813, and in January 1914 was seized and carried to Bermuda. The judge there condemned the tin, after a reference to the Ordnance and Dockyard officers, who reported zealously that tin was useful for tinning bread-rooms, light-rooms, fireplaces, etc.; also for making cases for carronnade, grape and case-shot, and for fixing wood bottoms to round shot. An appeal was interposed, praying restitution with costs and damages: and on March 20, 1817, the Lords Delegate pronounced for the appeal, reversed the sentence *quoad* the tin, and retained the principal cause: therein admitted the claim for the tin and decreed the same to be restored as claimed.

Reading "copper" for "tin," "Düsseldorf" for "Boston," we have a case almost the exact parallel of many which might have arisen in 1914–18.

No one can really appreciate the true nature of contraband who has not studied the lists drawn up by the various powers in the treaties of the seventeenth and early eighteenth centuries.[1] They vary, of course, expanding and contracting somewhat. But a perusal of them will leave the candid reader with the clear impression that to be truly contraband, an article must be specialized for war—must convey the suggestion of war on the face of it.[2]

Paper Blockades or Belligerent Impotence: a Via Media.—There is no doubt that the naval proceedings of 1914–18 amounted to paper blockades and blockades of neutral coasts, and that peaceful neutrals acquiesced in them largely on account of the initial and very grave illegality committed by Germany in the invasion of Luxemburg and Belgium. We may therefore treat them as products of an abnormal situation in which one belligerent was avowedly emancipating himself from the restraints of law, and as expressive of the disapproval of the world for the breach of treaties.

The phrase which has for the moment become fashionable of "the freedom of the seas" has of course nothing to do with the freedom of the seas in Grotius' sense. That expresses the great modern principle that the high seas are open to the navigation of all nations alike in all places: the new shibboleth appears to imply that they are equally open at all times. Great Britain went very far towards the adoption of such a principle when she appealed to The Hague Conference of 1907 to abolish the whole institution of contraband.

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[1] See, *e.g.*, Atherley-Jones, *Commerce in War*, pp. 7 *et seq.*

[2] Partisans of the doctrine that contraband must be some article specialized for war by manufacture (which would exclude saltpetre and other constituents of explosives) are Field, Kleen, Hefftev, Bynkershoek, Mosely, Manning, Despagnet, Hautefeuille, Rayneval, Pradier-Fodéré, Klüber, Thonier. Thonier's monograph on Contraband (Bordeaux, 1904) is most important and valuable.

Contra, Hall, Amos, Lansdowne, perhaps Ortolan, Halleck (who, however, states that "copper is not generally contraband," *International Law*, ii, §26, p. 22).

It was owing to the opposition of the United States, France, Germany and Russia that the proposal, enthusiastically welcomed by the smaller Powers, failed. The fact that it was made shows that Great Britain is not in principle opposed to large concessions to neutral commerce. If the old rule of the *Consolato del Mare* were restored, enabling the capture of enemy goods under whatever flag, she might well concede generous terms in the matter of contraband and convoy. A strictly limited list of contraband; the immunity of neutral ports; the immunity of duly warranted convoys; the exclusion of captors' evidence—these concessions combined would secure to neutrals a very full freedom of the seas. More is unlikely to be obtained; and, with less, neutrals have no sufficient or substantial security.

Reprisals.—There remains the difficult subject of reprisals. How far can neutrals be affected by them? If one belligerent does wrong to neutrals, may the other?

Cases may be put in which this seems just. If one belligerent obtains an advantage by infringing neutral rights, it is hard for the other to forgo the like privilege. The Germans made it a ground for denying the British seas to neutrals, that the latter had not prevented Britain from stopping their food cargoes. Britain, in her turn, seems to have regarded her act in sowing the high seas with mines as justified by the fact that Germany had already done so.

This specious plausibility does not detract from the soundness of Phillimore's view that reprisals ought not to be made against neutrals. That one party to the war has injured a neutral (and thereby obtained an advantage) does not of itself justify the other in inflicting further injury. A neutral who cannot at once force a belligerent to do what is right does not thereby become a wrongdoer and subject to reprisals. The doctrine of self-preservation (as in the case of the *Caroline*) may sometimes afford a temporary excuse for forcible action. But in the case of alleged improper captures of cargoes and merchantmen, the excuse does not hold good. A nation is not bound to facilitate the commerce of its subjects with both belligerents alike. There is no rule that in all matters a nation is bound to treat belligerent nations equally. If it wants to buy granite for public works, or to hire surveyors for exploration, it is not bound to balance each Englishman engaged by one German, or to order a ton of stone from Germany for each ton from Peterhead. Commerce may indirectly assist a belligerent. But the privilege to carry it on is the privilege of a neutral, and it cannot be made a ground for hostile action against him that he does not insist upon it. Duer's strong condemnation[1] of such a course can be found at p. 644 of his celebrated work on Marine Insurance (Vol. I).

In any revision of the effete system established by the Declaration of Paris, this should be insisted on, and express provisions protecting neutrals from reprisals introduced. The case where neutral complaisance amounts to participation in the war ought to be carefully defined: and it might be well to provide that reprisals on neutral commerce can never be made. This would operate as a check on inconsiderate demands.

Forecast.—If we cast our eye over the events of the past, we shall see a slow and gradual progress. In the sixteenth century, there are pretensions to interdict all trade with the enemy by an assertion of right. In the eighteenth century, the pretension has to cover itself with a cloak of reprisals. In the twentieth, it has to descend to the subtleties of continuous voyage. It is an advance, though a slow one. Probably great restrictions may be accepted for the immediate future: when the next mighty outbreak comes, it may not be too much to hope that no subterfuge will avail belligerents and that trade will proceed unchecked, except in obvious munitions of war.

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[1] "The right of a belligerent to invest with a naval force the ports of the enemy so as to exclude entirely the commerce of neutrals during the continuance of the investment is undoubted. It is true that the exercise of this right, by its obstruction of a commerce otherwise lawful, frequently operates as a serious grievance; but the grievance is one to which neutral governments and their subjects, by the law of nations, are bound to submit. Still, the right, considered as it affects the interests of neutrals, is severe in its nature—and it is more specially in such cases that a Court of Admiralty, in judging of the validity of a capture, is bound to ascertain that the rules of law have been strictly observed, and that the rights of war have not been exceeded. It is bound to watch the exercise of a right that in its most legitimate form is an oppressive restraint upon neutral commerce, with a peculiar jealousy, and should never permit its necessary evils to be aggravated by a lax indulgence of construction. I have stated these principles nearly in the language of Sir W. Scott—but it is painful to confess that, evidently sound and just as they are, they are not always remembered and followed by that eminent judge in his subsequent decisions. (I refer to the sanction that he gave to the celebrated Orders in Council of April 1807, which he defended on the sole ground that they were retaliatory (the *Fox*).) The principle that a belligerent power has a right to retaliate upon the enemy by following his example in trampling upon the rights of neutrals, is in its essence irrational, immoral and unjust."

See also the opinion of Phillimore, *supra*, p. 179.

One great factor in contributing to this result would be the revival of the doctrine of the ex-territoriality of merchant ships. Ex-territoriality may be a fiction—but it is undeniable that it was a fiction which contributed powerfully to the immunity of the neutral ship. Think of the *Trent* affair in 1861, and compare it with the equanimity with which America saw the *W. P. Frye* sunk in 1915! (Nay, compare it with the absolute indifference with which Britain saw Turks dragged from the *Africa* by Italians in 1912.) The change shows that the inviolability of the neutral flag had shrunk from a patriotism to a proposition. The magic touch of sentiment (on which Ortolan insists so powerfully) had gone from it: crystallized in the clear statement that a national ship was national territory, it was an intelligible article of faith to the populace. Reduced to the formula that national ships have certain immunities from foreign jurisdiction, it becomes meaningless to the great public. If we wish to preserve the rights of neutral commerce, it is above all necessary to restore the sentiment of the territorial character of merchant ships. This was a commonplace in quite recent times. Cavour[1] remarks—"The *Cagliari*, on the high seas, was a fraction of Piedmontese territory." Lord Lyndhurst says: "A merchant ship is part of the dominion of the country to which she belongs."[2] There is needed in our day more of this healthy sentiment of the inviolability of the national flag. It ought not to be placed under the control of quasi-municipal courts, however estimable, or subjected to the arbitrary rummaging of naval officers, however gallant. The once universally accepted rule "Ex ore tuo judicaberis" is the only proper one—and we have departed from it very far indeed. It should be the business of statesmen, jurists and mercantile men to restore it.

There is a sect of hopeful and innocent pedants who insist that there can be no neutrals in the future. Unless war is to be replaced by unchecked violence, masquerading under the name of "self-defence," or "Federal Execution," neutrality, with its rights and obligations, cannot be regarded as out-of-date. It urgently calls for protection.

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[1] 48 British State Papers, 428.

[2] W. B. Laurence, *Visit and Search*, p. 182.

DISRAELI AND THE CONSTITUTION.[1]

[*Contributed by* W. I. Jennings, Esq.]

Influence on the Constitution.—"Free government," wrote young Disraeli in 1835, "cannot be scribbled down—this great invention—in a morning on the envelope of a letter by some charter-concocting monarch, or sketched with ludicrous facility in the conceited commonplace book of a Utilitarian sage." [2] A constitution is not a mere law. It is a system of government whose nature depends upon those who manipulate it. To transport the English Parliamentary system to a foreign country is to change its nature. It functions well or ill not because of its inherent merits or defects, but because of the characters of the men who form part of it. The British Constitution in particular, being founded upon constantly changing custom, varies its face according to those who are called upon to administer it. Its whole nature may be changed because a minor civil servant has had an unsatisfactory dinner. The importance of a Prime Minister is correspondingly greater. "The English Constitution," Professor Laski once wrote,[3] "is different because Mr. Gladstone lived to be eighty-nine; and that is why a writer on the law of the English Constitution will study Lord Morley's biography hardly less closely than he studies the contemporary English reports. For the simple fact is that the key to the English reports is Mr. Gladstone's life." That this statement is capable of criticism is obvious. Would the Constitution have been appreciably different if Mr. Gladstone had died four years earlier? Does the Liberal tradition appear in the Law Reports until the nineteenth century has closed? But Professor Laski does not always expect to be taken too literally. His exaggeration contains a truth, that constitutions alter according to the peculiarities of statesmen. That Gladstone's influence was great cannot be denied. That the student of Constitutional law needs to read Morley's *Life of Gladstone* with great care is perfectly true, though he will find more of value in the *Letters of Queen Victoria*. But what of Gladstone's great opponent ? Did he contribute nothing ? Can the student neglect the five great volumes of the *Life of Disraeli* ? The answer is, I think, that he cannot. Disraeli's influence was at least as great. We may feel inclined, at the end of this paper, to think that it was greater. It was certainly more spectacular. There is a romance about Disraeli's life which even the most enthusiastic supporter of Liberalism will deny to Gladstone's. Even if we believe that the overthrow of Peel was a mistake, that the Queen was beguiled by outrageous flattery, that the passing of the second Reform Bill was a gross breach of faith, that the " forward movement " was a disaster, we must still feel that a statesman who governs a Queen and creates a party at least does something for the Constitution.

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[1] Based upon a paper read to the University of London Law Society.

[2] *Whigs and Whiggism*, p. 127.

[3] 31 *Harvard Law Review*, p. 499.

His Character.—To know what Disraeli did, we must know something about his character. He was born in 1804. That means, among other things, that he followed the progress of the Reform Bill as a politically-minded young man of 27 and 28 years of age. Most of it he followed from a distance, for he was then on the voyage to the East which coloured his political views from that time until he returned from Berlin bringing peace with honour—and the island of Cyprus. But he returned in time to offer himself as a candidate at High Wycombe in the last election for the unreformed Parliament. He was then a young man of 28, but old in experience. He had already operated on the Stock Exchange and contracted debts of £7,000 ; he had written pamphlets on finance to instruct others how to acquire riches ; he had helped to found an unsuccessful newspaper ; and he had written a successful novel. Let us remember also that he was a Jew, though his father was a freethinker, and he himself, if he owned any religion, was a Christian. The fact of his race colours—and colours is the correct word—not only his novels, but his political actions. It gave him that peculiar feeling for the East which his visit served only to make stronger. And it gave him, above all, that tolerance of all religions and that understanding of the foreign mind which contrast strangely with Gladstone's insular bigotry.

His Political Philosophy.—Disraeli offered himself to the electors of High Wycombe as a Radical. " Toryism," he said, " is worn out, and I cannot condescend to be a Whig." But he managed to gather many Tory votes ; and he found it possible to support the Tory candidate for the county at the next election, when he found himself forestalled in his own candidature. His views did not, in fact, coincide with those of any party. Temperamentally, he was bound to be a Tory, but he was bound also to be a Tory with a difference. The beliefs to which he gave expression in 1832 were not substantially different from those which he maintained as Prime Minister. He was, as he himself has said, a Tory democrat. But from 1832 to 1834 he was in isolation. When about to offer himself as a candidate at Marylebone, he was asked where he stood. " I stand," he said, " on my head."

In any case, it is not for us to explain how it was that a man who put himself forward as a Radical in 1832 could in 1834 join the Carlton Club. He has himself given the answer to those who ask for consistency in a statesman :

" A statesman is the creature of his age, the child of circumstance, the creation of his times. A statesman is essentially a practical character ; and when he is called upon to take office, he is not to inquire what his opinions might or might not have been upon this or that subject—he is only to ascertain the needful and the beneficial and the most feasible manner in which affairs are to be carried on. The fact is, the conduct and opinions of public men at different periods of their career must not be too curiously contrasted in a free and aspiring country." [1]

Disraeli's own views gradually acquired definition. When the *Vindication of the English Constitution in a Letter to a Noble and Learned Lord, by Disraeli the Younger* [2] was published in 1835, his political philosophy had reached its final form. It must not, of course, be thought that he had set himself to find the philosophy which was best suited to the English character and environment. He had just joined the Tory party, and he wanted to make himself known not only as a true Tory—it was not easy to live down his Radical reputation—but also as a promising Tory. He wanted to fulfil the function which necessarily fell to him later on, of expressing what the country gentlemen would have said if they had had the knowledge and the imagination to think of it. Like *The Patriot King*, to which it owes much, it was party propaganda, but it had more effect than most polemics. It gave the Tory party a *raison d'être* other than the mere preservation of the property of its members. He was 31, he had already written much on political matters, he had fought two elections, and within two years he was to enter Parliament. The *Vindication* forms the philosophical background of his political action from that time forward. That does not imply that he applied the test of his philosophy to every step which he had to take—he was far too much of an opportunist for that—but it was the general idea at the back of his mind. "This tract is the most important of Disraeli's early political writings," said Mr. Monypenny,[1] "and the fullest exposition of his political creed which preceded *Coningsby*; while even *Coningsby* . . . added little that is essential to the statement." And he adds, "The *Vindication* gave Disraeli what his fugitive efforts could never have given him, a recognized position as a political writer and thinker, and it not only helped to fix and clarify his own ideas, but, appearing at a moment when party boundaries were shifting and principles in a state of flux, it from the first exerted no inconsiderable influence over the development of political thought."

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[1] "The Crisis Examined" in *Whigs and Whiggism*, p. 34.

[2] Now published in *Whigs and Whiggism*, pp. 111–232.

That, of course, is exactly the effect which Disraeli hoped to produce. But we may pay tribute to the imagination which recognized that a political party needed principles. The Radicals, of course, had principles, but the Whigs and Tories between them had governed the country since Walpole without worrying overmuch about political philosophy. Bentham's cold light of reason had at any rate illuminated the mind of one member of the Tory party. The idea that a party needed more than vague generalities about Church and Crown is a pure product of Benthamism.

The pamphlet appeared three years after the passing of the Reform Act. The country had not found, as some people had apparently expected to find, that all troubles would disappear before the magic wand of Reform. The new Parliament was much like the old. Representation of the middle classes of the towns had wrought no change. Something, of course, had been done by the Whigs. The land law had been modified, the Poor Law and the municipal corporations had been reformed. But there was great dissatisfaction in the country. The new Poor Law system had not proved as popular as the purity of its principles gave reason to expect. If the people would not be "bullied into health" thirteen years later, they could not, in the thirties, be bullied into employment which did not exist. What the Tory party wanted, therefore, was to find a philosophy which would point out the fallacies of the Radical arguments which swayed the Whigs, and so bring the forces of General Depression to the side of the country gentlemen. This was the task of the *Vindication*.

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[1] Monypenny and Buckle, *Life of Disraeli* (2-vol. ed. 1929), vol. i, p. 310.

Utilitarian Political Philosophy.—The principle of the Radical philosophy, it need scarcely be said, was the "greatest happiness of the greatest number." The function of government was to establish and maintain this happiness. All administration must be directed to this end. And the only person who knows where a man's happiness lies is the man himself. His "enlightened self-interest" will indicate the most desirable policy. It follows that the only possible form of government is a completely representative one. Government by a class means government in the interests of that class. If each person has a vote, the person who receives the majority of votes will represent the desires of the majority of the people. The majority of votes among the representatives will then produce the policy desired by the majority of the people. This, in its essence, is the Utilitarian political philosophy. It involves on its negative side the disappearance of the monarchy, the House of Lords, and all ancient privileges and franchises. On the positive side it involves adult suffrage—or at least adult male suffrage—frequent Parliaments, and the election of new democratically elected local government bodies.

Disraeli is perfectly willing to admit the "greatest happiness of the greatest number" as the aim of government. But he declines to associate with it the doctrine of self-interest. He refuses to admit that the only motives which influence men are the desire of power and the desire of property. If that is so, then every man is a tyrant and a robber. In fact, like Burke, he denies that a constitution can be drawn up according to logic. Abstract theory cannot be applied to politics. A great nation develops its own constitution on the lines which best suit itself. The best type of constitution which the English can have is that which they have already. If we want to know the principles upon which government should be founded, we must examine the development of the constitution and induce general principles from it. To know what it ought to be it is necessary only to know what it has been. The *Vindication*, therefore, is an examination of the English Constitution as it appears in history.

Representative Character of Parliament.—This historical sketch brings out the general argument. Parliament is a representative body, and was a representative body before the Whigs started to modify it. It represents the Estates of the Realm. The King is one, the Lords another and the Commons form a third. And by the Commons is not meant the "people." The Commons are those specially privileged persons who are given the power to vote for Parliament. The House of Commons cannot, therefore, represent the people. The Commons, like the Peers, form a "privileged class, privileged in both instances for the common good, unequal doubtless in numbers, yet both, in comparison with the whole nation, forming in a numerical estimation only an insignificant fraction of the mass."[1] Election is not necessary to representation. The Church of England is faithfully and efficiently represented in the House of Lords by the bishops. "The law is represented in the Lord Chancellor and often the Lord Chief Justice, the counties in the Lord Lieutenants, the boroughs in their noble Recorders."[2] Since, moreover, the Peers are there in their own right, the House of Lords from the character of the property of its members "is also essentially the representative Chamber of the land, and as the hereditary leaders of the nation, especially of the cultivators of the land, the genuine and permanent population of England, its peasantry."[3]

Thus, both Houses represent Estates of the Realm, and the House of Lords is the more representative. Two consequences follow. The first is that there was no reason for changing the basis of representation in 1832. No doubt it is sometimes necessary to consider whether the privilege of representation shall not be extended to other persons, just as the King has the prerogative of summoning new persons to the House of Lords. But there is no need to extend the franchise in order to make the House "more representative." Secondly, there is no reason for regarding the House of Commons as superior to the House of Lords—in fact, the Upper House is the more representative, and certainly represents more important interests.

Disquisition on the Political Parties.—Next, Disraeli has to consider the Crown. The Lords and Commons, he tells us, had no greater privileges under William III than under Henry IV. But since they had become the most civilized and the most highly cultured body in Europe, it was necessary that they should virtually appoint the King's ministers and determine their policy. William III was his own minister, but the Whigs managed to secure control through the Hanoverian Succession. This leads Disraeli to a disquisition on the political parties. The Tory party, consisting of all the great property owners and their tenants, represents the people. The Whig party consists of a few "great families" in alliance with the Nonconformists. Thus, through the ignorance of the first two Georges, the Whigs managed to establish an oligarchy. It was only under George III that a change came about. "The King put himself at the head of the nation; and, encouraged by the example of a popular monarch in George III, and a democratic Minister in Mr. Pitt, the nation elevated to power the Tory or national party of England, under whose comprehensive and consistent, vigorous and strictly democratic system, this island has become the metropolis of a mighty Empire, its sovereign at the same time the most powerful and its people the most free, and second to no existing nation in acts or arms, in internal prosperity or external splendour."[1]

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[1] *Whigs and Whiggism*, p. 149.

[2] *Ibid.*, p. 185.

[3] *Ibid.*

We must not take all this as a serious attempt at political philosophy. The *Vindication* was a party pamphlet. We take most of it no more seriously than *The Patriot King*. But it is not all ephemeral. It is really based on Disraeli's rather vague political ideals. These ideals he had continually present in his mind, though he had never worked them into a positive policy. The discussion in the *Vindication* is therefore valuable as indicating what those ideals involved. Three things, it is clear, must be emphasized. He insists in the first place on a strong monarchy; in the second place on a strong House of Lords; and in the third place on a strong Tory party. "By the Conservative Cause," he said in 1837, in his usual magniloquent way, "I mean the splendour of the Crown, the lustre of the peerage, the privileges of the Commons, the rights of the poor."[2] Let us now see how Disraeli the statesman attempted to carry out these ideals.

Queen Victoria's Opposition to Disraeli.—The Queen's early opinions of Disraeli were by no means favourable. The Prince Consort had found in Sir Robert Peel a kindred spirit. The politician who, with Bentinck, led the Tory revolt against Peel's repeal of the Corn Laws and then with seventy protectionists joined the Whigs in turning out the favourite Minister was not likely to be popular with the Prince's dutiful wife. In any case, there seemed to be little in common between the stolid, unimaginative young Queen and the strange young Jew. It is not surprising, therefore, that so late as 1851, when Lord Stanley was trying to form a Government after Lord John Russell's defeat, and suggested Disraeli as Leader of the House of Commons, the Queen said, "I always felt that, if there were a Protectionist Government, Mr. D. must be the Leader of the

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[1] *Whigs and Whiggism*, pp. 210–11.

[2] *Life*, vol. i, p. 414.

House of Commons: but I do not approve of Mr. D. I do not approve of his conduct to Sir Robert Peel." [1] And how long she had "always felt" this may be gathered from her statement only four years before, that she was "shocked" because Sir Charles Wood had designated Disraeli as a member of a future Government.[2] Yet in 1852 Disraeli became not merely a Cabinet Minister, but Chancellor of the Exchequer and Leader of the House of Commons. He did not at once acquire any importance in the Queen's eyes, and he could not therefore attempt to put into practice any ideas which he may have had for associating the Queen more closely with the government of the country. "In the present case," she wrote to the King of the Belgians,[3] "our acquaintance is confined almost entirely to Lord Derby, but then he *is* the Government. They do *nothing* without him. He has all the Departments to look after, and on being asked by somebody if he was not much tired, he said: 'I am quite well with my babies.'" This is a sad indication of the way in which the Queen's prejudices might blind her to political realities, but it also shows what a mountain of opposition Disraeli had to remove to place himself on any reasonable terms with his Royal Mistress. It was not an impossible task. Sir Robert Peel had accomplished it. He had broken through the prejudice created by the Bedchamber Plot. And Disraeli's personal charm made the problem easier of solution.

A short acquaintance enabled the Queen and the Chancellor to reach a better understanding. His letters to the Queen, reporting the proceedings of the House, had much to do with it. "Mr. Disraeli (alias Dizzy)," she wrote soon after the new Government came into power,[4] "writes very curious reports to me of the House of Commons proceedings—very much in the style of his books." The truth is that Disraeli, even in 1852, possessed a wider knowledge of life than any leading minister since Melbourne. He had in addition a facility with language which only a novelist could possess, and the charm of manner of a perfect courtier. The fulsome, highly coloured flattery in which he delighted to indulge was not, as he knew, unacceptable to the Queen. His Oriental spirit ran riot when he saw his position as one of the leading servants of a great Queen whose dominions stretched to the four corners of the world. It was not merely that she was a monarch, but that she was a woman as well. For the time being, he was not an acceptable suitor, but she could not forbid him to communicate with her. And willy-nilly she was won.

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[1] *Life*, vol. i, p. 1106.

[2] *Letters* (First Series), vol. ii, p. 164.

[3] *Ibid.*, p. 467.

[4] *Ibid.*, p. 467.

The Queen's Change of Opinion.—Her opinion of him noticeably changed during his first tenure of office. His support of the Prince Consort's plans for a new National Gallery in South Kensington appreciably improved his position. Even so, the Prince could at the end of 1852 speak of Disraeli's "laxity of political conscience." [1] Nevertheless, there were no doubts or sneers when Disraeli came to the Exchequer again in 1858. Relations became appreciably cordial even before the Prince's death. Disraeli had had a great regard for the Prince, and he did not hesitate to express it when death suddenly carried off the royal statesman. Naturally, too, he expressed it better than most others. The consequence was that the Queen came to regard Disraeli as the one statesman who had really understood the Prince's greatness.

When, therefore, Disraeli became, in 1866, Chancellor of the Exchequer for the third time, his relations with the Queen were very friendly. She no longer communicated her opinions to Derby, leaving him to pass them on to his colleague. It was only natural that when, in 1868, she had information that Derby contemplated retirement, she should have no hesitation in informing Disraeli that he would be the successor. When the appointment was made, she wrote to him: [2]

> The Queen has ever found Mr. Disraeli most zealous in her service, and most ready to meet her wishes, and she only wishes her beloved husband were here now to assist him with his guidance!

That is just the point: Disraeli was most ready to meet her wishes. He considered her feelings and prejudices as he would consider the feelings and prejudices of one of his Ministers. He would take steps to remove difficulties before they became too obvious. He thought of the effect which a proposal would have on the Queen, as well as the consequences which it might have in Parliament. He would smooth the path by a little preliminary diplomacy. Moreover, he was careful to keep his relationship on a personal note. The Queen was to him no mere piece of constitutional machinery. She was in his eyes the actual ruler of a mighty Empire. And she was a woman. "I plight my troth to the kindest of *Mistresses*," he said on becoming Prime Minister for the second time.[3] His idea of a perfect relation between the Queen and her

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[1] *Life*, vol. i, p. 1239.

[2] *Life*, vol. ii, p. 326.

[3] *Letters* (Second Series), vol. ii, p. 322.

Minister was, in his own words, " that there should be on her part, perfect confidence ; on his part, perfect devotion." [1]

Gladstone's Attitude to the Queen.—Gladstone's attitude was entirely different. We must not forget that from 1861 there was a strong republican movement in Britain, and though Gladstone never gave it any encouragement, it was impossible for the leader of the Liberal party not to be affected by it. For Gladstone, therefore, the Queen was a piece of constitutional machinery—a necessary piece no doubt. Gladstone made up his mind, did his best to bring his colleagues round to his point of view, and then presented detailed conclusions to the Queen. If she demurred, he would send her a long memorandum. " The Queen regrets to say she finds (unlike almost *any* other Government) no readiness, especially not in Mr. Gladstone, to *listen* to her views and *warnings*, which so often have proved (when it is *too late*) to be right," she wrote in 1882.[2] And again, in a letter to the Prince of Wales: [3]

> You as my eldest son, and so intimate as you are with Lord Hartington, *might* and *should* I think speak strongly to him, *reminding* him *how* HE *asked you to tell me in* '80 *that if I took Mr. Gladstone I should certainly* NOT *have to take these violent and dangerous Radicals*, instead of which, *two* days after, I had *most unwillingly* taken this most dangerous man ; *all* the *worst men* who had no respect for Kings and Princes or any of the landmarks of the Constitution *were put into the Government in spite of me.* The mischief Mr. Gladstone does is incalculable ; instead of *stemming* the current and downward course of Radicalism, which he could do *perfectly*, he *heads and encourages it* and alienates all the true Whigs and moderate Liberals from him. Patriotism is nowhere in their ranks. How differently do the leaders of Opposition behave to the disgraceful way in which in times of great difficulty the *Liberal Opposition* opposed Lord Beaconsfield and tried to injure him !

The judgment of history must be that in the matter of Home Rule Gladstone was right and the Queen wrong. But admitting the difficulty of Gladstone's task, it must nevertheless be recognized that, great as his qualities were, tact and *finesse* were not among them. It is not impossible to imagine Disraeli carrying the Tory party with him to repeal the Act of Union. After all, Peel repealed the Corn Laws and Disraeli produced the Second Reform Act. One feels that if Disraeli had been in Gladstone's position there would have been no such hysterics as this letter discloses. He might even have persuaded the Queen herself to propose the repeal. He would at any rate have realized that she was as great an obstacle as the Conservative Party, and would have prepared the ground accordingly. There is no doubt that this tact of his was the cause of his being able to increase the Queen's personal influence. "He shows more consideration for my comfort than any of the Prime Ministers since Sir Robert Peel and Lord Aberdeen," said the Queen herself as early as 1868.[1] It is almost an insult to place him in the same class as Aberdeen, and probably Peel acquired a halo through his friendship with the Prince Consort. It would be truer to say that no Prime Minister treated the Queen so deferentially and yet so firmly as Disraeli.

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[1] *Letters* (Second Series), vol. i, p. 551.

[2] *Ibid.*, vol. iii, p. 298.

[3] *Ibid.*, vol. iii, p. 299.

Disraeli's Attitude to the Queen.—Exactly how far he gave in to her views is difficult to determine. I think we can say generally that he never accepted her point of view in preference to his own in any matter which he considered important. At her instigation he proposed legislation in 1876 for adding "Empress of India" to her title, in spite of his belief that it was at the moment politically inexpedient. But he believed that a change of title was desirable; he was most anxious to provide some external symbol of the attachment of India to the Crown; and his only objection was as to the exact moment when the change should be proposed. There were many conflicts over Church appointments. The Queen favoured candidates of moderate views. Disraeli cared not who was preferred so long as the preferment added strength to the Conservative Party. In the disputes which followed, the Queen was usually successful, chiefly because Disraeli had a very weak case to argue. She persuaded him to accept Bishop Tait as Archbishop of Canterbury instead of the candidate whom he strongly supported, for political reasons.[2] But probably it did not appear to him to matter whether the Church had a good Archbishop or a bad one. He would not have given way if the discussion had been over a minister or a judge.

Disraeli's real innovation was to admit the Queen to the actual making of policy. Gladstone presented her with the deed already drawn up, and needing only signing, sealing and delivery. Disraeli consulted her about the contents and the form. This was an innovation, but it must be remembered that the Queen was the first monarch since the development of the Cabinet system whose views were really worthy of respect. George I and George II knew little or no English and were not interested in anything except the aggrandizement of Hanover. George III was English by nature, but tried to abolish the Cabinet system altogether. He worked either through subservient ministers or in opposition to rebellious ministers. For George IV no minister had any respect, while William IV was honest but incompetent. This made possible the growth of a tradition of excluding the monarch from the actual formation of policy. But Queen Victoria, though limited in mental equipment, prone to prejudice, and deficient in imagination, had both the knowledge and the will to form an opinion which was at least worthy of consideration. She was no doubt heavily biased in favour of the lesser German states, and she was over-hasty in her judgments. But she knew everyone of importance in Europe. She was at the end of her reign the "grandmother of Europe." She had seen politics from the inside since 1837. She had been schooled by Melbourne and Wellington in all that pertained to her station. She was able to remind her ministers of what Wellington had told her about Mr. Pitt. In short, she had a fund of knowledge and common sense upon which any minister with imagination might draw. Disraeli was naturally predisposed to do so. At the back of his mind was a patriot Queen, who governed the country with the aid of a patriotic Parliament. He therefore realized the position in which he found himself.

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[1] *Letters* (Second Series), vol. i, p. 539.

[2] *Ibid.*, p. 551.

"The relations that subsisted between your Majesty and myself, when I had the honour of being your Majesty's chief servant," he said in 1880,[1] "assisted me quite as much as they assisted your Majesty. And this stands to reason. For more than forty years your Majesty has been acquainted with the secret springs of every important event that has happened in the world, and during that time, you have been in constant communication with all the most eminent men of your Kingdoms. There must, necessarily, have accrued to a Sovereign, so placed, such a knowledge of affairs and of human character that the most gifted must profit by an intercourse with your Majesty, and the realm suffer by your Majesty's reserve."

The Monarch's Influence on the Cabinet.—It stood to reason. And Disraeli made full use of his opportunity. He treated the Queen as a colleague. He allowed his ideas to develop in his conversation and in his letters as if she were one of the ablest of his lieutenants. She was never suddenly confronted with a policy already formulated and accepted. She took part in the formulation. The policy was developed by the interaction of the members of the Cabinet and the Queen. Her influence on the second Reform Bill was profound. Equally powerful was her support of the "forward policy." Since she helped to formulate the policy, she necessarily knew the divisions of opinion within the Cabinet. She helped to persuade the dissentients. She became in fact one of the Cabinet. But she was, so to speak, a member of the Cabinet out of the Cabinet. She was not present at the meetings. The final compromise was reached in her absence. Nothing was left for her but the formal assent. She had to accept the policy which the Cabinet had fixed upon. But she had much to do with the fixing. Gladstone told Sir Robert Phillimore that if Disraeli mentioned to the Queen any of his colleagues who had opposed him in the Cabinet, "he was guilty of great baseness and perfidy." [1] But Gladstone placed too much emphasis upon tradition. The Queen's position was necessarily different from her predecessors'. Practices adopted because of a line of incompetent monarchs do not necessarily become constitutional conventions which must be obeyed. It must be asked whether there is any reason behind the convention—whether it has some reason for its existence other than the mere incompetence of preceding monarchs. The Cabinet system must exist not merely because George I knew no English, but because in the last resort policy must be determined by those who represent the people. But if another part of the constitutional machinery can add to the experience of the Cabinet, there is no reason to refuse such aid merely because there is no precedent for it. The Constitution must alter according to the characteristics of those who exercise its functions.

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[1] *Letters* (Second Series), vol. iii, pp. 146–7.

What effect in fact has the innovation? How far can a Queen, however sagacious and however learned, influence a Cabinet whose power rests ultimately upon popular support, whose ability will on the average be greater than her own? Clearly very little, especially when the constitutional conventions forbid her to be present at Cabinet meetings. In no important matter did she persuade Disraeli to adopt a policy contrary to his own views. The policy of the country was that of the Prime Minister and his colleagues. The Queen's part was comparatively small. It was affectation of a kind peculiarly pleasing to Disraeli to speak of *her* ministers and *her* policy as if she appointed the first and framed the second. In the same way he announced the purchase of the Suez

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[1] *Life*, vol. ii, p. 1326, quoting Morley's *Life of Gladstone*. The reference cannot, however, be traced.

Canal shares in the words "It is just settled: you have it, Madam."[1] He managed the Queen as he managed his party, by infinite patience and infinite tact. Nevertheless, his innovation was important. It did not increase the powers of the Crown, but it increased the monarch's personal influence. He proved that it is not inconsistent with democracy for a monarch to take part in the formulation of policy and to use what influence he may possess in furthering the cause of his ministers. The difficulties which may arise are obvious, and are illustrated by the Queen's conspiracy with Salisbury to get rid of Gladstone.[2] Whether the innovation was good or bad does not, in fact, concern us here. We need to know only that it existed. And we may feel sure that Edward VII would have had less influence upon the Anglo-French Entente[3] but for Disraeli, and that the present King would have been able to intervene less effectively—if he did intervene—in the Irish disputes of 1921.

Disraeli's Attitude to the House of Lords.—Of Disraeli and the Lords there is little to say. We do not hear again of the superiority of the House of Lords. It is clear from his catalogue of the ministers who must be in the Commons, made when he pointed out to Palmerston the presence of five Under-Secretaries in the House, that he regarded the Commons as essentially the representative body.[4] He evidently regarded the presence of one Secretary and one Under-Secretary, together with the Lord Chancellor, the Lord Privy Seal, the Lord President of the Council and (as was frequent in his day) the Prime Minister, as enough for the Lords. There was never an occasion on which it became necessary for him to take sides in a dispute between the two Houses. There was no need for him to intervene when the Lords refused to repeal the Paper Duties in 1860, since Palmerston was fighting Gladstone in the Cabinet itself. There is no doubt that his theory of the representative character of the Lords was nothing more than a useful and youthful extravagance. Nothing can be more positive than his own declaration when he himself was transferred to the noble assembly: "I am dead: dead, but in the Elysian fields."

Disraeli as a Party Leader.—Of Disraeli as a party leader much might be said. But we are concerned only with effects on the Constitution as a whole. He regarded, and continued to regard, the party system as the only one which made government by assembly possible. It was his primary function, therefore, to keep together a strong and united Conservative party. His difficulties in this respect were even greater than those which he faced in his relations with the Queen. He first acquired a commanding position by leading the rebels against Peel. He therefore had to contend throughout his political life with the enmity of the Peelites, and especially with the malignant hatred of Gladstone. In addition, he was only accepted by the country party because he supported the Protection which they considered necessary for their own profit and the benefit of the country. Even then, the nominal leader was Bentinck. After Bentinck's death they accepted Disraeli only because he was under Derby's banner. He was a Jew, an alien in thought and manner, a person who earned his living by scribbling, until he married a rich widow. He had too much imagination and too much eloquence to be a true country gentleman. Even in 1868, when there was no doubt at all that he must succeed Derby as Prime Minister, Lord Chelmsford obtained a laugh by saying, " That Government was the Derby, this the Hoax." We remember, of course, that Disraeli had refused to reappoint Chelmsford as Lord Chancellor because of his incompetence. But the fact that the joke was possible at all indicates that there remained a certain antipathy to Disraeli : otherwise it would have been universally regarded as in the worst of taste.

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[1] *Life*, vol. ii, p. 788.

[2] *Letters* (Third Series), vol. i, p. 128.

[3] Sir Sidney Lee, *King Edward VII*, vol. ii, ch. ix.

[4] Hansard, vol. 174, cols. 1218 to 1231.

In spite of these difficulties Disraeli triumphed as a party leader. He weaned the party from Protection. He made it " dish the Whigs " in 1867. He left such a tradition behind that the more extreme section of the Conservative party to this day deposits a wreath of primroses at the foot of his statue on his birthday—a strange consequence of the life of one who began as a Radical and carried many Radical ideas with him to the grave, and who, whatever Queen Victoria may have said, or he said to Queen Victoria, cared more for the exotic colours of the East than for the pale products of the English countryside.

Party Organization.—In his zeal for the Conservative party he did not forget that a party must have an opposition. As he said in 1864,[1]

> believing that Parliamentary Government is practically impossible without two organized parties—that without them it would be the most contemptible and corrupt rule which could be devised—I always regret

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[1] Hansard, vol. 174, col. 1221.

anything that may damage the just influence of either of the great parties in the State.

At the same time, this did not prevent him from creating as many difficulties as he could for Russell, Palmerston and Gladstone, and from creating dissension in the Liberal party.

His most important contribution to the practice of party politics was, however, the party organization, which he first developed. In 1868, after he had triumphantly carried through the Reform Bill, the constituencies had the bad taste to return Gladstone with an immense majority. Such a force had not been seen in the House since the days of Peel. "There are few positions less inspiriting than that of a leader of a discomfited party," he wrote in his life of Lord George Bentinck, in describing Lord John Russell's position in 1841. It was applied by Mr. Buckle to Disraeli's in 1868. It might be applied even nearer our own day. There was great discontent on the Conservative benches. At one time the "Colonels" got out of hand. There was even talk of a change of leadership. If press lords had been known, there would, no doubt, have been a press agitation. But all the time Disraeli was deliberately keeping quiet in Parliament, and working outside while waiting for the turn of the tide.

He was helped by a young barrister named Gorst.[1] Together they established the Conservative Central Office under the party manager, aided by a permanent staff. Local associations were formed on a democratic basis. A register of approved candidates was kept, though the selection was left to the local associations. Finally, all these local associations were affiliated to a comprehensive National Union. The machine was in operation at all the by-elections from 1871 onwards, and Disraeli kept a close watch on the results. But its full effects were not felt until the General Election of 1874, and it was no doubt partly responsible for Disraeli's great majority. For the first time since Peel the Conservatives held a majority over all opponents. Naturally the Liberals were equally discomfited. They felt the necessity of a similar organization. And, equally naturally, they did it better. But the point is that Disraeli began the modern organization of party conflict. He created the organized party system. Modern politics therefore owe much to him, and, perhaps, not the best characteristics—though it is quite untrue to say, as Gladstone said, that all the deterioration in the conduct of public men was due to one man and one man only, Disraeli.[1] There is no doubt that Queen Victoria would have said that the decline set in with the "pilgrimages of passion" which Gladstone himself began.

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[1] See Harold Gorst, *The Fourth Party* (1906), pp. 32 *et seq.*; *Life*, vol. ii, pp. 524 *et seq.*

Conclusion.—It is clear, at any rate, that Disraeli's influence on the working Constitution was very great. He immensely strengthened the personal position of the monarch: he created the modern party organization. Whether these changes were for good or ill we are not called upon to say. It is at any rate certain that the Constitution would have been very much different if Disraeli had not been Prime Minister.

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[1] Lord Morley, *Life of Gladstone* (1903), vol. iii, p. 475.

"DOMINION" NATIONALITY.

[*Contributed by* E. F. W. GEY VAN PITTIUS, ESQ., M.A. (S.A.), Ph.D. (Lond.), *Senior Lecturer in Political Science at the University of Pretoria.*]

THREE of the Dominions—Canada, the Irish Free State and South Africa—instituted their own nationality some time ago. The Canadian variety was originally introduced to facilitate the application of immigration laws and was later modified to meet the requirements of the Permanent Court of International Justice in respect of national judges. In the case of the Irish Free State citizens were very ambiguously defined in Art. 3 of the Constitution. The Union of South Africa defined its nationals in Act No. 4 of 1927.

Those Dominion enactments have so far only enjoyed local validity. The general description "British subject" obtains in Great Britain, the colonies which have not yet attained Dominion status and also in those Dominions which have not instituted the local national status. British nationality is the same throughout the British Commonwealth (with the possible exception of the Irish Free State, where the position is somewhat obscure). Unanimity was reached at the successive Imperial Conferences, where a general draft has been agreed on, has been enacted by Parliament at Westminster and has been gradually adopted by all the Dominions.[1] It is clear that, if a natural born British subject,[2] who is not debarred from any of His Majesty's Dominions by immigration laws, moves from one part of the British Commonwealth to another, he carries that status with him and, if there is no local discriminatory legislation, he becomes in due course entitled to all the rights of natural born subjects within that area. This fact has made it difficult for Dominions to impose a local national status. It also seems clear that any Dominion nationality must necessarily be a distinction made within the larger and wider conception of British subjecthood which prevails throughout the British Commonwealth.

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[1] The doubtful position of the Irish Free State still remains; the statements made throughout this article are all subject to that qualification.

[2] According to the British Nationality and Status of Aliens Act, 1914–22 (4 & 5 Geo. V, c. 17 and amendments).

Domicile as a Criterion.—It is evident that birth alone—which confers British nationality owing to the operation of the *jus soli*—could not be adopted as the sole test for Dominion nationality. Consequently in the laws defining Canadian, Irish or South African nationals domicile has been largely adopted as a criterion.

In Canada the following are deemed to be Canadian citizens :[1] (1) (*a*) Any British subject who is a Canadian citizen according to the Immigration Act[2], *viz.* a person born in Canada who has not become an alien[3] ; (*b*) a British subject of Canadian domicile ; (*c*) a person naturalized under the Canadian laws who has not subsequently become an alien or lost his Canadian domicile. (2) The wife of a Canadian national as described above. (3) Any person outside Canada, provided that his father was a Canadian national at the time of that person's birth. Provision is also made for the renunciation of Canadian national status.[4]

Probably—the Act is very ambiguous—the following are deemed to be Irish citizens[5] : (1) A person born and domiciled in the Irish Free State on December 6, 1922 ; (2) A person domiciled in the Irish Free State on December 6, 1922, if either of his parents was born there ; (3) A person who on December 6, 1922, was ordinarily resident in the Irish Free State and had been so for at least seven years.

The Irish Constitution also provides that " any . . . person being a citizen of another State may elect not to accept the citizenship hereby conferred."

Generally speaking, the following are Union (*i.e.* South African) nationals[6] : (1) A person born in any part included in the Union, who is not an alien or a prohibited immigrant ; (2) A British subject who has legally entered any part of the Union and who has been continuously domiciled in the Union for at least two years so long as he retains his domicile ; (3) " A person domiciled in the Union and not being a prohibited immigrant under any law relating to immigration who became a naturalized British subject under the laws of any part of South Africa included in the Union and who has for a period of at least three years after entry into that part of South Africa been continuously domiciled in the Union so long as he retains such domicile and does not become an alien " ; (4) A person born outside the Union of a father who is a Union national ; (5) The wife of a Union national. As in the Canadian Act, a person who is both a Union national and also a national of some other part of the British Commonwealth may renounce his Union national status. On the other hand, a person retains his Union national status until he loses his Union domicile, whereas under the Canadian Act a presumption of loss of domicile arises after an absence of one year. The position of Union national status has been further strengthened by the institution of a separate flag.[1]

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[1] C. 4 of 1921.

[2] C. 27 of 1910 as amended by c. 25 of 1919.

[3] An " alien " is a person who is not a British subject.

[4] S. 2 (*a*) of c. 4 of 1921 provides : " Any person who by reason of his having been born in Canada is a Canadian national, but who at his birth or during his minority became under the law of the United Kingdom or any self-governing Dominion of the British Empire a national also of that Kingdom or Dominion, and is still such a national," and " Any person who though born out of Canada is a Canadian national—May if of full age and not under disability make a declaration renouncing his Canadian nationality."

[5] Art. 3 reads as follows : " Every person, without distinction of sex, domiciled in the area of the jurisdiction of the Irish Free State at the time of the coming into operation of this Constitution who has been born in Ireland, or either of whose parents was born in Ireland or who has been ordinarily resident in the area of the jurisdiction of the Irish Free State for not less than seven years, is a citizen of the Irish Free State and shall within the limits of the jurisdiction of the Irish Free State enjoy the privileges and be subject to the obligations of such citizenship " (13 Geo. V, c. 1, 1st Schedule).

[6] Act No. 4 of 1927.

Territorial Limitations.—So far " Dominion " nationality has lost most of its effectiveness owing to the fact that the Dominions have no power to pass extraterritorial legislation as a general rule. As soon as a person therefore passes the three-mile territorial limit of his Dominion, his Dominion nationality is in abeyance until he returns home. Also, the fact that Great Britain, India and the colonies which do not enjoy Dominion status, as well as Australia and New Zealand, have not yet inaugurated a separate nationality within the larger British nationality has had a nugatory effect. Furthermore, the Dominions do not maintain diplomatic representatives in all foreign countries and therefore the protection of their nationals very often has to be entrusted to the agents of His Majesty's Government in Great Britain.

As a result of the Report of the Conference on Dominion Legislation[2] which was issued in London last year the territorial limitations of Dominion legislation will probably be remedied in the near future.[3] The recommendation is that Dominions be empowered to pass legislation with extraterritorial effect in all cases where it is necessary for their peace, order and good government. When these recommendations are translated into law Dominion nationality will become an accomplished fact; it is true that Dominion nationality would still fall under the larger conception of British nationality, but, at the same time, it will no longer be limited to the territorial jurisdiction of the Dominion concerned.

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[1] Act No. 40 of 1927.

[2] Parl. Pap. Cd. 3479.

[3] See Keith in *Journal of Comparative Legislation*, Third Series, vol. xii, pt. iv, pp. 278 *et seq.*

Future Developments.—It must be noted that Parliament at Westminster can still legislate for the Dominions with their consent. This method has been very effective for introducing uniform nationality laws throughout the British Commonwealth. But there can be little doubt that at least some of the Dominions will avail themselves fully of the opportunity of passing extraterritorial legislation in order to consolidate the national status of their own citizens. No doubt there are still obscure points which require further definition; as Professor Keith states: "The relations of the several parts of the Empire cannot be adjusted merely by according every part unfettered authority. . . ."[1]

It must now be admitted that the expression "Canadian national" or "Irish citizen" has far greater significance than the term "citizen of London."[2] Nor is this new departure to be deplored. The term "Canadian national" affords an important clue as to what such person's rights, privileges and duties are in respect of Canada; it confers also, *inter alia*, the right of protection by Canadian diplomatic agents abroad. The term "British subject" is too wide; also, it is not in accordance with the new status of the Dominions. It is submitted that a better description of a South African national would be "South African British subject"; the same epithet could be applied, *mutatis mutandis*, by the other Dominions; it would be particularly appropriate to adopt this description on passports.[3]

It must be remembered that Dominion nationality is still in its infancy. No doubt experience will teach the Dominions that it will be less troublesome to define more clearly the status of their nationals and to prescribe carefully under what conditions that status will lapse or when it can be resumed (as is the case to a large extent with the laws relating to Canadian nationals). At the same time the quintessence of British nationality, which like the Crown pervades all parts of the Commonwealth, will remain as a cloak to denote the bonds which still unite the various autonomous parts of the Commonwealth.

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[1] *Journal of Comparative Legislation*, Third Series, vol. xii, pt. iv, p. 280.

[2] See the writer's treatise, *Nationality within the British Commonwealth of Nations* (1930), pp. 224 *et seq.*

[3] *Ibid*, ch. xviii.

A COMPARISON OF THE GENERAL PRINCIPLES OF CRIMINAL LAW IN ENGLAND WITH THE "PROGETTO DEFINITIVO DI UN NUOVO CODICE PENALE" OF ALFREDO ROCCO.[1]

[*Contributed by* W. T. S. STALLYBRASS, ESQ., D.C.L.]

PART I. GENERAL CONSIDERATIONS—ACTUS REUS.

ITALY has been called the *patria del diritto penale*, and with justice. Nor has she been forgetful of her heritage. The names of Beccaria, Carrara, Lombroso and Ferri have won the homage not only of Italy but of the world. England, too, has played her part in the progress of the world towards a rational system of criminal law. But her contribution has been different in kind. She cannot boast of any names other than those of Howard and Bentham, which are recognized beyond the confines of her own land as having helped to the advancement of penal theory. Her glory is that, thanks to the integrity and ability of her judges, the high standard of honour and public spirit of her bar, the practical common sense of her citizens who serve upon her juries and the efficiency of her police, there is no country in the world where an innocent man is less likely to be convicted or a guilty man is less likely to escape punishment for his crime. The genius of the Italian is for theory; the genius of the Englishman is for practical administration. Each in his own way has contributed much to the improvement of criminal law. Each still has much to learn from the other.

It is natural, then, that the proposal of a new Penal Code in Italy should excite great interest in England. It is inevitably profitable to compare the proposals with the law in England as it exists to-day. But any such comparison is difficult and runs the danger of being fallacious. The Englishman has no faith in paper codes or in paper prisons. His instinct is to say, "Show me the law in action, show me over a prison." English law is built up empirically; it is the product of judgments in decided cases. It has been said of the Roman lawyers that "they were not philosophers but thoughtful examiners of particular cases. They argued from concrete to concrete; they rested on analogy, not on abstractions; their method was that of Type, not of Definitions. The Digest and Code are not scientific treatises on law, but ordered collections of decisions, with more or less reasoning on the acts and position, real or assumed, of certain classes of persons in family or business relations. Such generalizations as we find are but little removed from particular facts, are applicable to very limited spheres, are often inconsistent and may be subject to many exceptions."[1] Much the same may be said of English criminal law. Our statutes contain no enunciation of general principles; though of recent years many crimes have received statutory definitions, even now there is no statutory definition of murder. If we would discover the principles of English criminal law we must elicit them from the judgments of our English judges in particular cases. It is these only which can safely be taken as laying down the law.[2] The reasoning of even the most eminent jurists has no authority as a statement of the law. When that great criminal judge Sir James Fitzjames Stephen in 1874 cast the law into the form of a code, which never became law, he was merely attempting to put in systematic form the result of the decisions of his predecessors on the Bench.

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[1] This study in an Italian translation was published in the *Annuario di Diritto Comparato e di Studi Legislativi*, vol. vi, p. 1. The English original is printed here by the kind permission of Professor Salvatore Galgano, General Secretary of the Istituto di Studi Legislativi in Rome. There are a few additions in the shape of references to more recent literature.

How different is the position in Italy! The new *Progetto* is the culmination of the thought and labours of many generations of jurists who have turned their minds to the problem of evolving an integral and consistent scheme of criminal law. Whilst the data of English law are decisions in English concrete cases which are binding on subsequent tribunals, the data of Italian lawyers are the thoughts and writings of distinguished jurists and writers from all over the world. English law is the product of the judges carrying out their daily duty of administering justice; Italian law is the creature of thought. Yet when the comparison which is the object of this paper is made we shall be more struck by the resemblances than by the differences between the products of English empiricism tempered by reason and Italian theory tempered by practical experience.

It is not my object in the following pages to write a commentary upon the new *Progetto* for those who are well versed in continental criminal systems. Nor is it my aim to set it in its proper relation to the Classical or Positivist schools which have won for Italy so much renown, or to compare it with the Code at present in force. This has already been admirably done by Battaglini,[3] and, speaking generally, one may adopt the conclusion of S. E. Saunders:[4] "This new school of law in Italy has been called neo-classical, yet from the social point of view it approaches more nearly to the positive. With one hand it seems to be grasping firmly the tenets of the classical school, while the other takes from the positive school everything regarding measures of public safety." Nor again is it my aim to try to interpret the new code as a product of

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[1] Roby, *Roman Private Law*, i, pp. xi–xii.

[2] Contrast Italian law where the legislature alone has the power to make binding interpretations: Battaglini, *Principii di Diritto Penale*, i, p. 214.

[3] In his *Principii di Diritto Penale in Rapporto alla Nuova Legislazione*.

[4] In 165 L.T.J. 308.

Fascism. This also has been admirably done by Battaglini in the same book.

My object has been to make comparison between the provisions of the *Progetto* and the existing rules of English law. Such a comparison must inevitably be of more value to continental jurists than to English lawyers. Englishmen are bound down by precedent. To an Englishman a knowledge of the provisions of the new Code is practically valuable only in so far as it may act as a guide for the exercise of judicial discretion or may influence public or professional opinion to press for a change in the form or the content of our statute law. On the other hand, on the continent of Europe the shape which the many new codes of criminal law at present under consideration are to take and the principles which they are to embody are matters of vital and pressing importance. It is therefore the primary object of this paper to suggest to continental lawyers for consideration the ideas that may be gathered from the principles enshrined in our English common law system. It is only a secondary object to suggest to English lawyers that in not a few respects have they suffered from the immemorial cleavage between the common law and continental jurisprudence.

Such being the primary object, the method of approach has been to attempt to extract from our common law the underlying principles of criminal liability, and to compare them with the corresponding principles to be found in the *Progetto definitivo* of Alfredo Rocco, which is probably the most important of all the new projected codes. It is the easier to do this since Rocco has provided us with a masterly *Relazione* to enable us the better to understand the meaning and motives of the *Progetto* which he has sponsored.

The *Progetto definitivo* opens with a clear pronouncement against arbitrary power on the part of the government and arbitrary punishment. "No one may be punished for an act which is not expressly deemed to be an offence by the law, nor with punishments which are not established by the law."[1] Thus at the very outset we are met by a provision which embodies one of those conceptions which go to make up the supremacy or the rule of law which Professor Dicey in his brilliant and illuminating *Law of the Constitution*[2] written in 1885 regarded as characteristic of the political institutions of England since the Norman Conquest. Dicey states[3] his rule thus: "No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land." This rule will not, however, be found in any Code or law of the Constitution. It is a rule of the Common Law, and its observance is secured in two ways: by redress for unlawful arrest or imprisonment by means of a prosecution or action, and by deliverance from unlawful imprisonment by means of the writ of *habeas corpus*.[4] Thanks to the Habeas Corpus

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[1] Art. 1.

[2] (8th ed.), pp. 179 *sqq.*

[3] *Ibid.*, p. 183.

[4] *Ibid.*, p. 204.

Acts, 1679 and 1816, if "any man, woman or child is, or is asserted on apparently good grounds to be, deprived of liberty, the court will always issue a writ of *habeas corpus* to any one who has the aggrieved person in his custody to have such person brought before the court, and if he is suffering restraint without lawful cause, set him free."[1] Dicey adds, "There is no difficulty, and there is often very little gain, in declaring the existence of a right to personal freedom. The true difficulty is to secure its enforcement. The Habeas Corpus Acts have achieved this end, and have therefore done for the liberty of Englishmen more than could have been achieved by any declaration of rights."[2] It is perhaps legitimate for an Englishman to doubt whether the provisions in Arts. 613 to 617 of the *Progetto Definitivo,* taken from the present Penal Code, for the punishment of those who are guilty of illegal arrest or imprisonment are as effective in securing personal freedom as the remedial procedure provided in England by the Habeas Corpus Acts.

Article 2 provides for the non-retroactivity of laws except in favour of the accused. If an offence is subsequently made dispunishable the execution of the sentence comes to an end, except in the case of exceptional and temporary laws, the purpose of which might otherwise be defeated.

English law does not regard *ex post facto* legislation with favour.[3] A great judge, Willes, J., in giving the judgment of the Court of Exchequer Chamber in the famous case of *Phillips* v. *Eyre* in 1870 said,[4] "Retrospective laws are, no doubt, *prima facie* of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the existing law. '*Leges et constitutiones futuris certum est dare formam negotiis non ad facta praeterita revocari ; nisi nominatim et de praeterito tempore et adhuc pendentibus negotiis cautum sit.*' Accordingly, the court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature." And this is peculiarly true of criminal law. "Criminal offences are not to be created by giving a retroactive operation to Acts of Parliament."[5] And so in 1861 Erle, C. J., said, "It manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment. Modern legislation has almost entirely removed that blemish from the law."[6]

Yet it cannot be said that to give an *ex post facto* operation to an enactment is "hostile to the spirit of English law,"[7] and Willes, J., in the passage already cited stated that a retrospective law was not contrary to natural justice. If a statute is designed to protect the public interest, the courts will attach great weight to that fact, and not improbably give it retrospective operation. So in 1875 it was held [1] that a statute of 1870 which imposed a disqualification upon "persons convicted of felony" from selling spirits by retail applied to persons convicted before the passing of the Act, and that licences held by such persons became void on the passing of the Act. Further, statutes making an alteration in judicial procedure have in general a retrospective operation.[2]

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[1] (8th ed.), p. 215.

[2] *Ibid.*, p. 217.

[3] Allen, *Law in the Making* (2nd ed.,) pp. 274 *seq.*

[4] L.R. 6 Q.B., p. 23.

[5] *Per* Denman, J., in *R.* v. *Griffiths,* [1891] 2 Q.B., p. 148.

[6] *Midland Ry. Co.* v. *Pye,* 10 C.B.N.S., p. 191.

[7] *Per* Platt, B., in *Ex parte Clinton,* (1845) 6 St. Tr. N.S., c. 1107.

Again, case-law works retrospectively. "It is one of the disadvantages of case-law that, since it declares the law which is and which was, its effect may be very inconveniently retrospective; and sometimes the legislator has to step in for the benefit of persons who are prejudicially affected by this retrospective operation." [3]

In the United States *ex post facto* legislation is expressly prohibited by the Constitution.[4] It will have been seen that there is no such provision in English law, but an Act to make that unlawful which was lawful when it was done would so offend public feeling that it may be regarded as a contingency too remote to be seriously considered.

There is no provision in English law for the cessation of punishment when the offence of which the prisoner was convicted has ceased to be an offence. The content of English criminal law is more stable than that of Italian criminal law. Apart from exceptional and temporary laws it is difficult to think of an act which was a crime sixty years ago but is not a crime now. The work of the legislature has been rather to fill up the gaps left in the criminal law than to make lawful that which was unlawful. Yet such a case may arise. Last year (1930), for example, there was a Bill before the House of Commons to abolish the penalties for blasphemy which received not a little support. Fortunately it was thrown out. But it may pass in the future. Even if it does it seems improbable that any problem will arise. According to the latest criminal statistics there has been no trial for blasphemy since 1921.[5] And such an Act would have little prospect of passing unless the law creating the offence were practically a dead-letter, and therefore there was no one serving a sentence. Yet it is conceivable that some future Government may repeal the Trade Disputes and Trade Unions Act, 1927 [6] which makes it a criminal offence to take part in strikes and lock-outs which have any object other than or in addition to the furtherance of a trade dispute within the trade or industry in which the parties are engaged and is designed or calculated to coerce the Government either directly or by inflicting hardship upon the community. If such a repeal were effected it can scarcely be doubted that the Government would use the prerogative power of pardon to release any persons serving a sentence for an offence under the Act.

I now propose to desert the order of the *Progetto definitivo* and to consider in the light of the *Progetto* the elements of crime as they appear to an Englishman.

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[1] *R.* v. *Vine*, L.R. 10 Q.B. 195.

[2] *R.* v. *Chandra Dharma*, [1905] 2 K.B. 335; *R.* v. *Austin*, (1913) 8 Cr. Ap. R. 169.

[3] Allen, *op. cit.*, p. 275.

[4] Art. I, s. 9 (3).

[5] Criminal Statistics for 1927 (Cmd. 3301), p. 23; for 1928 (Cmd. 358), p. 11.

[6] 17 & 18 Geo. V, c. 22.

The fundamental rule of modern English criminal law is the maxim *actus non facit reum nisi mens sit rea*, a maxim first found in its present form in Coke's Institutes,[1] but the origin of which the great Maitland[2] traced back to St. Augustine.[3] But it has been said by one of our greatest criminal lawyers, Sir James Stephen,[4] that this maxim means no more than that the definition of nearly all crimes contains a mental as well as an outward and visible element. The maxim is certainly not exhaustive of the necessary elements of criminal proceedings. In order that an act may be criminally justiciable in England there are four constitutive conditions :

(1) There must be an overt act by the accused.
(2) There must be *mens rea*.
(3) The act must not have been done on a privileged occasion.
(4) The act must be within the jurisdiction of the English courts.

I propose to deal with each of these heads *seriatim*.

I. ACTUS REUS

An overt act is an act capable of being observed by someone else. A man may be liable for default in doing such an act, but he will never be liable for mere intention unevidenced by an observable act. Even in the treason of compassing the King's death the intention must be manifested by an overt act,[5] and in conspiracy the consultation which is necessary for the criminal agreement is itself an overt act, though no proof of an act done towards the carrying out of the agreement is necessary.[6] In English law, as under the *Progetto definitivo*,[7] an omission to act may be a criminal act.[8] In the great majority of these cases the omission to be criminal must be wilful, *e.g.* neglect to give information of high treason or felony, neglect to obey the lawful order of a court, fraudulent omission from accounts, and most cases of neglect of children. But in others the omission may be by inadvertence, *e.g.* in nuisance, in manslaughter by neglect, as with the signalman who fails to put up the signal, and in certain crimes of neglect of children.

But the *Progetto* goes further than English law in providing that "not to prevent an event, which it is obligatory to prevent, is equivalent to causing it." The *Relazione*[9] explains that this deals with a case where the result is directly due to another cause. In such a case, according to English law, the omission might be a substantive crime, but it will not be regarded as the cause of the event that ought to have been prevented.

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[1] *Co. Inst.*, iii, 6.

[2] Pollock and Maitland, *History of English Law* (2nd ed.), p. 476, n. 5.

[3] *Sermones*, No. 180, c. 2.

[4] *History of Criminal Law*, ii, p. 95.

[5] *R.* v. *Thistlewood*, (1820) 33 St. Tr. 682.

[6] *R.* v. *Aspinall*, (1876) 2 Q.B.D. at p. 58.

[7] Art. 44.

[8] Cp. *Harnett* v. *Bond*, [1924] 2 K.B. 517.

[9] i, p. 84.

So in the case of the Mayor of Bristol in 1831[1] who failed to use due means to put down a riot in which various public and private buildings were burnt down and several persons were killed, he was not charged with riot or arson or murder but with neglect of duty.[2]

It is a novelty in a Code to have an article which deals generally with the concurrence of causes as does Art. 45 of the *Progetto definitivo*. The Code at present in force deals with this subject only in connexion with homicide, and it is in connexion with homicide that the question usually arises, as is shown by the fact that the English cases on the subject arise out of that crime. By English law it is not necessary that the defendant's act should be the immediate cause of the death for the death to be imputed to him, except in the case of death caused by the omission of a particular duty,[3] but the cause must not be too remote.[4] It is impossible to define with accuracy the exact point at which the law draws the line, and in many cases the remoteness of the consequence may be evidence to reduce the charge from murder to manslaughter. Thus death, though not caused by direct violence, has often been treated as murder,[5] and the mere acceleration of death is sufficient,[6] whilst death from fright or terror is imputable.[7] The accused may be guilty even though the actual cause of death was the act of some third person,[8] but not if the defendant has not himself been guilty of negligence but has merely committed an unlawful act disconnected from the death by the intervening negligence or act of a third person.[9] Nor will the defendant be absolved necessarily because the immediate cause of the death was the deceased's own negligence[10] or the deceased's own act.[11] So he is guilty of murder who incites another to take his own life and is present at the time, as in the case of a suicide pact.[12] The English law of homicide is therefore in accord with the *Progetto* in holding that a *novus actus interveniens*, either of the injured person or a third person, whether intentional or negligent, does not necessarily exclude the causal relation. Yet in civil law the tendency in England is to regard a *novus actus* as breaking the chain of causation. "In general," said Lord Sumner,[13] "even though A is in fault, he is not responsible for injury to C, which B, a stranger to him, deliberately chooses to do. Though A may have given the occasion for B's mischievous activity, B then becomes a new and independent cause. It is hard to steer clear of metaphors. Perhaps one may be forgiven for saying that B snaps the chain of causation; that he is no mere conduit pipe through which consequences flow from A to C, no mere moving part in a transmission gear set in motion by A; that in a word he insulates A from C." The result appears to be that in civil law, as I have written elsewhere,[1] it does not matter " whether the *novus actus* be justifiable, lawful, negligent or criminal or whether it be the act of the plaintiff or of a third party. If it be ' new and independent,' an act of volition, not automatic, reflex or without consciousness of what the actor was doing, the chain of causation will be broken, and the original wrong-doer will be relieved from liability. In such a case the original fault is not the direct cause of the damage."

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[1] *R.* v. *Pinney*, 5 C. & P. 254.

[2] In the law of torts, however, Lord Dunedin has suggested that "supine inaction" may be an *actus* causing an event: *Canadian Pacific Rly. Co.* v. *Kelvin Shipping Co.*, (1927) 138 L.T., p. 374.

[3] *R.* v. *Pocock*, (1851) 17 Q.B. 34.

[4] Thus by common law the death must occur within a year and a day of the act that causes it, a wise provision in the days when medical science was defective; see Kenny, *Outlines of Criminal Law* (12th ed.), pp. 141–2.

[5] *R.* v. *Huggins*, (1730) 2 Ld. Raym. 1574; *R.* v. *Hickman*, (1831) 5 C. & P. 151.

[6] *R.* v. *Martin*, (1832) 5 C. & P. 128; *R.* v. *Plummer*, (1844) 1 C. & K. 600.

[7] *R.* v. *Hayward*, (1908) 21 Cox 692.

[8] *R.* v. *McIntyre*, (1847) 2 Cox 379; *R.* v. *Davis*, (1883) 15 Cox 174.

[9] *R.* v. *Hilton*, (1838) 2 Lew. 214; *R.* v. *Bennett*, (1858) 8 Cox 74. Cp. the case mentioned by Ferri, *Principii di Diritto Criminale*, p. 451.

[10] *R.* v. *Wall*, (1802) 28 St. Tr. 51; *R.* v. *Holland*, (1841) 2 Mood. & Rob. 351.

[11] *R.* v. *Evans*, (1812) 1 Russ. Cr. (8th ed.) 624; *R.* v. *Pitts*, (1842) C. & M. 284.

[12] *R.* v. *Dyson*, (1823) Russ. & R. 523.

[13] *Weld-Blundell* v. *Stephens*, [1920] A.C. p. 986.

And in criminal law also the death is sometimes held to be too remote to be imputable to the defendant.[2] So it is well settled that it is not murder to bring about a man's death by perjury.[3]

The tangle in which English law finds itself will be obvious from what has already been said.[4] Nor is any help given by the epithets sometimes attached to such causes as involve liability. That master of the common law, Lord Sumner, has said,[5] " It is surprising how many epithets eminent judges have applied to the cause which has to be ascertained for this judicial purpose of determining liability, and how many more to other acts and incidents, which for this purpose are not the cause at all. ' Efficient or effective cause,' ' real cause,' ' proximate cause,' ' direct cause,' ' decisive cause,' ' immediate cause,' ' *causa causans*,' on the one hand, as against on the other, ' *causa sine qua non*,' ' occasional cause,' ' remote cause,' ' contributory cause,' ' inducing cause,' ' condition ' and so on." We might add " dominant cause " and " common-sense cause " to the first list.[6] Lord Sumner continues, " No doubt in the particular cases in which they occur they were thought to be useful or they would not have been used, but the repetition of terms without examination in other cases has often led to confusion, and it might be better, after pointing out that the inquiry is an investigation into responsibility, to be content with speaking of the cause of the injury simply and without qualification." Italian lawyers have not escaped the same difficulty. Thus the illustrious Enrico Ferri speaks[7] of the juridical cause as consisting " *nella causa efficiente o decisiva dell' effetto stesso cioè quel precedente—di azione od inazione—che, di solito è prossimo all' evento e senza del quale questo non*

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[1] *Salmond's Torts* (7th ed.), p. 167.

[2] *R.* v. *Waters*, (1834) 6 C. & P. 328; *R.* v. *Mastin*, (1834) 6 C. & P. 396; *R.* v. *Pocock*, (1851) 17 Q.B. 34; *R.* v. *Rees*, (1886) Sess. Pap. civ.

[3] *R.* v. *Macdaniel*, (1756) 19 St. Tr. 745; Fost. 131.

[4] Cp. Green's *The Rationale of Proximate Cause* (Kansas City, 1927).

[5] *British Columbia Electric Rly. Co.* v. *Loach*, [1916] 1 A.C., pp. 727–8.

[6] *Clan Line Steamers* v. *Board of Trade*, (1928) 44 T.L.R., p. 59.

[7] *Principii di Diritto Criminale*, pp. 450–1.

si sarebbe prodotto." And in the next page he speaks of the "*causa immediata.*"

The *Progetto definitivo* in Art. 45 solves all these problems by the simple rule that only those supervening causes exclude the relation of causality which are by themselves sufficient to determine the event. Such a solution of the difficulties inherent in remoteness has the merit of simplicity, but would involve a big change in English law, *e.g.* the suicide pact would no longer involve the survivor of the unlawful partnership in a charge of murder.

It is not necessary either in England or in Italy that there should be a completed offence in order to constitute an *actus reus*.

Attempts are dealt with in Art. 60 of the *Progetto definitivo*. In the Code at present in force a distinction is made between preparatory and executive acts. That distinction is now removed, and it is left to the discretion of the judge to determine when the acts are directed to the criminal purpose. But in order to constitute an attempt the act must be one capable of producing the desired effect and the will must be directed to that end.[1]

English lawyers, no less than Italian, have found it impossible to give a water-tight definition of what constitutes an attempt.[2] "It is no doubt difficult, if not impossible," said Jervis, C. J., in 1855,[3] "to lay down any definite rule, as to what is such an act done in pursuance of a criminal intent, as constitutes an indictable misdemeanour; and I will not attempt to draw the line; but there is no great practical difficulty in saying whether any particular case falls within or without the line." The definition in the Draft Criminal Code adopted by the Court of Criminal Appeal in *R.* v. *Laitwood*[4] is probably the most authoritative: "An act done or omitted with intent to commit that offence forming part of a series of acts or omissions which would have constituted the offence if such series of acts or omissions had not been interrupted either by the voluntary determination of the offender not to complete the offence or by some other cause." But the definition is not exhaustive. For it is well settled that "there is a great difference between preparation antecedent to the commission of an offence, as in the case of merely going to buy a gun wherewith to commit a murder, which I do not think would be evidence of an attempt to commit a murder."[5] So Lord Trevethin, C. J., said[6] in 1921: "The question how far back along a chain of acts leading up to the commission of a crime there comes the dividing line between those acts which are mere preparation for the commission of a crime and those which amount to an attempt to commit it is not always easy to answer."[1]

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[1] *Relazione*, i, p. 100; Battaglini, *Principii di Diritto Penale*, i, p. 158.

[2] For a careful and exhaustive treatment of the criminal law in Anglo-Saxon countries see Sayre, "Criminal Attempts," in 41 *Harvard Law Review*, p. 689 *seq.* (1928).

[3] *R.* v. *Roberts*, 7 Cox, p. 43.

[4] (1910) 4 Cr. App. R. 248.

[5] *Per* Blackburn, J., in *R.* v. *Cheeseman*, (1862) 9 Cox 100.

[6] *R.* v. *Cope*, 38 T.L.R. 243. Contrast *R.* v. *Woods*, (1930) 22 Cr. Ap. R. 41.

Making every allowance for the difficulty involved in finding a water-tight definition, it would seem that the distinction between preparatory and executive acts, though itself (as has been seen) not easy to draw, provides a useful guidance for the judge's discretion, and that it might well have been retained in the new Code. In this respect the new Code seems to cover a wider field of acts than English law. But in another respect the reverse is true. Under the Code the act must be suitable, *i.e.* capable of producing the result intended.[2] There is no such limitation in English law. An attempt is none the less indictable because the attempted crime could never have been committed. It used to be thought otherwise, but it is now well settled that this is the law.[3] So an attempt to pick an empty pocket is an attempt to steal.[4]

Criticisms have been passed upon the severity of the punishment accorded to attempts by the new Code[5]—twenty-four to thirty years' imprisonment if the offence is one punishable with death, not less than ten years if the offence is punishable with penal servitude for life, and in other cases one-third of the punishment allotted to the offence. This is certainly far more rigorous than English law. At common law every attempt to commit an indictable crime is punishable with imprisonment which in practice never exceeds two years.[6] But by statute heavier sentences have been fixed for specific attempts, *e.g.* penal servitude for life *may* be given for attempts to murder, to discharge firearms with intent to maim, and to choke with intent to commit an indictable offence.

It was a fundamental belief of the Neapolitans that attempts should so far as possible be removed from the rigour of punishment,[7] and since a momentary aberration of the judges in the reign of Edward III the English have never acceded to the maxim *Voluntas reputabitur pro facto.* But whether we have regard to the wickedness of the will of the individual or to his danger to society it seems right that a rational penal system should not draw too great a distinction between the man who has succeeded and the man who has failed in his criminal purpose.

Alike under English law and under the new code only an *actus* in the full sense is a crime. It must, according to the Code, be committed "*con coscienza e volontà.*"[8] "No involuntary action," said Stephen,[9] "whatever effects it may produce, amounts to a crime by the law of England." An involuntary act is not really an act at all.[1] Only an act moving from the will is in law imputed to a man as *his* act. His body may produce the physical consequences and yet he himself may not be regarded as doing the act in law. In such a case there is no *actus reus*. These cases fall under eight heads.

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[1] Cp. *R.* v. *Taylor,* (1859) 1 F. & F. 511; *R.* v. *Landow,* (1913) 23 Cox 457; Holmes, J., in *Commonwealth* v. *Kennedy,* (1897) 170 Mass. p. 22: "Every question of proximity must be determined by its own circumstances, and analogy is too imperfect to give much help."

[2] *Relazione,* i, p. 100.

[3] *R.* v. *Brown,* (1889) 24 Q.B.D. 357; *R.* v. *Brown,* (1899) 63 J.P. 790.

[4] *R. v. Ring,* (1892) 17 Cox 491.

[5] *Relazione,* i, p. 101.

[6] Archbold, *Criminal Pleading* (26th ed.), p. 240.

[7] Battaglini, *Principii di Diritto Penale,* i, p. 109.

[8] Art. 46.

[9] *Hist. of Criminal Law,* ii, p. 100.

(i) It was said as long ago as 1549[2]: "If a Man's Arm be drawn by Compulsion, and the Weapon in his Hand kills another, it shall not be Felony." And this is still good law.[3] So the *Progetto definitivo*[4] relieves from liability the man who commits the offence compelled by physical violence which he cannot resist and from which he cannot escape. In such a case the person applying the compulsion is guilty of the crime, and answerable for the act. So in *R.* v. *Pitts*[5] it was held that if a person being attacked from a well-grounded and justifiable apprehension of immediate violence threw himself for escape into a river and was drowned, the person attacking him was guilty of murder. "A man may throw himself into a river," said Erskine, J., "under such circumstances as render it not a voluntary act; by reason of force, applied either to the body or the mind." Indeed, in such cases under the *Progetto definitivo*[6] the punishment is increased.

(ii) It is doubtful whether English law would recognize the defence that the prisoner had acted under hypnotic influence.[7] If, however, the court were satisfied that the patient was entirely deprived of control over his actions it would seem consonant with principle to hold that the acts done by him were the acts rather of the hypnotizer than of himself. This is a field, however, in which perhaps the English courts would hardly recognize facts generally considered in France to be well-established.[8] In the case of G. J. Smith, who in 1915 drowned three successive wives in their baths, it was the view of Sir Edward Marshall Hall, who was counsel for the prisoner, that he did it by hypnotic influence, but Scrutton, J., who tried the case did not accept that view.[9]

Similar doubts obtain in Italy, and therefore in the *Progetto definitivo*, as distinguished from the Preliminary Project, no express provision is made for hypnotic suggestion.[10] Should such a case be proved it would fall under Art. 89, which makes the man responsible who has produced a state of incapacity of intention or will in another person.

Incidentally it may be remarked that neither Italian nor English[11] law has accepted dual personality as a defence.

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[1] Austin, *Lect. on Jurisprudence* (6th ed.), p. 1060 n.

[2] Serjeant Pollard's argument in *Reniger* v. *Fogossa*, Plowd. at f. 19.

[3] Hale, *Pleas of Crown*, i, p. 434.

[4] Art. 50.

[5] (1842) C. & M. 284.

[6] Art. 115.

[7] Stroud, *Mens Rea*, pp. 244–57.

[8] Taylor, *Medical Jurisprudence* (8th ed.), ii, p. 109.

[9] Watson, *Trial of G. J. Smith*, p. 44; Marjoribanks, *Marshall Hall*, pp. 353–6. Cp. p. 116.

[10] *Relazione*, i, p. 90.

[11] *R.* v. *Kopsch*, (1925) 19 Cr. App. R. 50. Cp. Stroud, *op. cit.*, p. 194.

(iii) So also the innocent agent is not criminally responsible. "If A had prepared the Poison and delivered it to D to be administered to B as a Medicine, and D accordingly in the Absence of A had administered it *not knowing that it was Poison*, and B had died of it, A would have been a Principal in the murder . . . for, D being Innocent A must have gone wholly Unpunished if He could not have been considered as a Principal."[1] Such a case would seem to be covered by Art. 51 of the *Progetto definitivo*.

(iv) Art. 49 of the *Progetto definitivo* makes unpunishable the man who has committed the act "*per caso fortuito o forza maggiore*." Neither the *Progetto* nor the *Relazione* explains what is a "*caso fortuito*." In the case of accident put by East[2] there would seem to have been no *actus* on the part of the defendant: "A whips an horse on which B is riding; whereupon the horse springs out and runs over a child, and kills it; this is manslaughter in A, but misadventure in B."

But the defence of "accident" or "misadventure" in English law covers a wider field than this. An accident is an effect produced by an act not done with the intention of causing it, and not so probable that a person of ordinary prudence ought in the circumstances to take reasonable precautions against it. So in *R.* v. *Bruce*[3] a drunken man spun a small boy round in fun with his consent; the boy broke away and in consequence the prisoner reeled out into the road and hit and knocked down a woman who died. The prisoner's act was not unlawful, and Erle, J., said: "It is in the eye of the law an accident, and nothing more." Such cases as this seem properly to rest upon the absence of a *mens rea* rather than of an *actus reus*. And there would therefore seem to be not a little justification for the line taken by Ferri, who in his Project made no express mention of "*caso fortuito*" as a defence on the ground that all crime is either due to intention or negligence, and that accident excludes both, except where the man is engaged *in re illicita*.[4] So in *R.* v. *Packard*,[5] where a bailiff in possession was plied with spirits by the prisoners and died within two hours, Parke, B., directed the jury that if it was "really and solely for the purpose of good fellowship, for making merry," it was no crime; if it was done for an unlawful object, *e.g.* to keep the bailiff out of possession, it was manslaughter.

(v) Acts done in sleep or in a state of unconsciousness can hardly be attributed to the actor. "Can any one doubt," asked Stephen, J.,[6] "that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing." Under the same head come involuntary movements of the body impelled by natural causes independently of wish or desire, *e.g.* such as arise from convulsions or a spasm or epileptic fits.[1] Under the *Progetto definitivo* such cases would seem to fall rather under the general provision of Art. 46 than under Art. 88, which deals with the capacity of intention and will.[2]

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[1] Foster 349. Cp. *R.* v. *James*, (1837) 8 C. & P. 131.

[2] 1 P.C. 255. So in *R.* v. *Davies*, (1913) 29 T.L.R. 350.

[3] (1847) 2 Cox 262. Cp. *R.* v. *Finney*, (1874) 12 Cox 625.

[4] Ferri, *Principii di Diritto Criminale*, pp. 455–6.

[5] (1841) C. & M. 236.

[6] *R.* v. *Tolson*, (1889) 23 Q.B.D. p. 187. Cp. in Scotland, *H.M. Advocate* v. *Fraser*, (1878) 4 Cowp. 70; in the U.S.A. *Fain* v. *Commonwealth*, (1879) 39 Am. Rep. 213.

(vi) If uncontrollable impulse were recognized as a ground of exemption from responsibility it would be because in such cases there is no *actus reus*. But insanity exempts from liability because there is no *mens rea.* And for purposes of convenience the subject of uncontrollable impulse will be discussed when considering the question of insanity.

(vii) and (viii) It might perhaps be reasonably maintained that if A does an act because it is his duty to obey B without question the act is rather the act of B than of A. It might also be argued that when A does an act under stress of emotion engendered by the provocation he has received from another, he is partially excused because his control over his actions is temporarily destroyed. But it seems safer to regard both these cases as instances of the immunity, partial or total, afforded on certain privileged occasions rather than as based on the absence of an *actus reus*.

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[1] *R.* v. *Perry*, (1919) 14 Cr. Ap. R. 48. Cp. McCardie, J., in Trial of Ronald True (ed. Carswell), pp. 229–38, 254.

[2] *Relazione*, i, p. 140.

[*To be continued*]

FOREIGN PERSONS AND COMPANIES DOING BUSINESS IN GERMANY.

A Brief Survey of German Company and Tax Law.

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Methods of Acquiring an Interest in German Industry.—Since the stabilization of the German currency a great number of business men came to Germany in order to study its economic conditions and to examine the possibilities of selling their goods on the German market.

Foreign persons and companies followed two different methods with a view to acquire an interest in German industry and commerce.

(1) Foreign concerns through contractual relationships used German concerns as distributors of their products in Germany. Arrangements were also made for the use of German patents and trade marks, and the exchange of information as to technical processes. To this end foreign concerns purchased blocks of shares in German concerns as permanent investments and, incidental thereto, reserved the right to appoint one or more members of the supervisory board (*Aufsichtsrat*).

In some cases the influence of foreign industry in German enterprises became such that the latter lost its economic independence and the German business was continued as an agency of the foreign concern. German law imposes no restrictions as to the sale of shares abroad or as to the nationality or the residence of the members of the managing board (*Vorstand*) or supervisory board. It is therefore possible for a foreign company to take over the entire capital stock of a German company and substitute foreigners appointed by it for all German officials of the company. Such a change would not affect the nationality of the company nor deprive it of the rights and benefits incident to its nationality.

It is obvious that since the beginning of the depreciation of the German currency attempts have been made to protect German industry and commerce against the acquisition of controlling interests by non-residents. To prevent such acquisition companies issued preferred shares of a nominal value of one thousand Reichsmarks each, which were paid in to the extent of 25 per cent. Such preferred shares were given from 100 to 1,000 votes each, whereas the common shares of the same nominal amount retained only one vote each. The voting rights on the preferred shares were exercised by the supervisory board or by persons intimately connected with the company, with the effect that no holder of any block of common shares, irrespective of its amount, could succeed in obtaining any important voting influence in the company. This system reacted against the German investor as well because the supervisory board became unresponsive to his wishes. The German investor thus realized that the invention created by him to avoid the invasion of non-residents undermined his own position in the company. A strong tendency to abolish shares with disproportionate voting rights developed and now legislative measures are contemplated providing for a compulsory change.

No effective means have been taken to prevent the influence of foreign capital. No law discriminating against certain foreigners is permitted under Art. 276 of the Treaty of Versailles. This article provides that Germany will not (*a*) subject the nationals of the Allied and Associated Powers, their property, rights or interests, including companies and associations in which they are interested, to any charge, tax or interest, direct or indirect, other or higher than those which are or may be imposed on her own nationals or their property rights or interests, and (*b*) submit their nationals of the Allied and Associated Powers to any restriction which was not applicable on July 1, 1914, to the nationals of such Powers unless such restriction is likewise imposed on her own nationals. It follows that a concentration of German shares in the hands of English persons cannot be prevented by any legal means of whatsoever nature, not even by an extra tax charging the sale of German shares abroad.

(2) On the other hand, a continuously increasing number of foreign companies are starting their own organization in Germany and are manufacturing, distributing and selling their goods on the German market.

The purpose here is not to discuss whether it seems preferable to use a German company as agent as outlined above or to run the business itself. The decision will largely depend upon the individual circumstances, and no general rule can be given in this respect. The intention is only to explain briefly to non-residents, particularly English readers interested in Germany, the different types of organizations offered by German law for the purpose of starting a business in Germany and the legal conditions to be met thereby, which will, of course, include a short analysis of the taxing situation.

One of the leading principles of German law is freedom of trade: Germans and foreigners are admitted to any kind of manufacturing or commercial business on the same terms. This rule applies without restriction to all individuals and has been confirmed with regard to foreign companies in Art. 16 of the Commerical Treaty concluded August 17, 1925, between Germany and England.

However, the acquisition of real estate in the Free State of Prussia by companies registered abroad is still subject to governmental approval.

This restriction imposed upon foreign companies is not of great importance, because as a rule the concession for the purchase of immoveables has always been and doubtless will in future be granted without serious difficulty. Apart from this exception, foreign companies enjoy in Germany the same rights and privileges and have to comply with the same duties and obligations as German companies.

Types of Organizations.—Correspondent Office.—There are three different types of organizations suitable for the purpose of doing business in Germany by foreign individuals or corporations:

It is possible to open simply a correspondent office or an agency without applying for its registration in the commercial register.[1] It is not a legal institution under German law, and it has the disadvantage that the correspondent office or agency as such cannot acquire rights, dispose of any property or conclude legal acts. In order to enable the correspondent office to function freely in accordance with the provisions of German law it is advisable to have one person as an independent agent in charge of the office who is vested with full power to represent the foreign firm or company in every respect. It is needless to point out that such a general power must show clearly that the persons who executed the same on behalf of the foreign firm or company were entitled to do so. The power must be acknowledged before a notary public and the notary's signature must be authenticated by a German Consul-General.

It is obvious that the foreign firm or company is fully responsible for everything done or omitted by its correspondent office in Germany. On the other hand, this form has advantages in that the opening of the correspondent office does not involve the payment of an organization tax, of notarial or registration fees and that there are no formalities connected with setting it up. For these reasons some foreigners prefer to start business in Germany along these lines in order to explore the field and to decide later whether conditions warrant a permanent organization.

Branch Office.—If the judicial status of the foreign company[2] is recognized in Germany it can have a branch office (*Zweigniederlassung*) registered in the commercial register. Although the registered branch office does not encounter difficulties of the kind described above with regard to the correspondent office, its registration and maintenance require attention to a great number of formalities.[3]

Registration of the branch office is made in the commercial register of the local court (*Amtsgericht*) of the city wherein the office is intended to be opened. For this purpose the foreign company must file with an application for registration executed in notarial form by all the members of its managing board, a certified copy of the certificate of incorporation, of the memorandum of association and of the articles of association, if any, all authenticated by a German Consul-General and accompanied by certified German translations and a list containing the names, profession and residence of the officers. If the company is not registered in a commercial register abroad, a certificate of the German Consul or other official document must show that the judicial status of the company is fully recognized according to the laws of the state in which it was organized. If a special power of attorney has been granted to represent the German office, the person or persons so authorized must also be recorded.

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[1] The commercial register (*Handelsregister*) is an official book kept by the judge of a local court (*Amtsgericht*) in every German city. All firms, partnerships and companies have to file in the register of the city in which their head offices and their branch offices are located, their trade-name, constitution, the names of their representatives and other information prescribed by the German Commercial Code (*Handelsgesetzbuch*). The register is free for inspection to everybody.

[2] We refer only to companies, as foreign partnerships will not consider the opening of branch offices, although this is permitted under German law.

[3] The main rules regarding branch offices are laid down in Arts. 13 and 201 of the German Commercial Code (*Handelsgesetzbuch*) of May 10, 1897.

The German Commercial Code stipulates that the rules relating to entries which must be made in the local commercial register of notices, statements and applications are the same as the rules applicable to the main office of a German company located in Germany, unless the law of the foreign country, to which the company is subject, makes a variation necessary. It goes without saying, that it is extremely difficult to determine in which case a variation of the German conditions is necessary and that many disputes arise regarding the interpretation of this statute. Obviously an extract from the commercial register cannot be submitted if the foreign law does not provide for such a registration.

On the other hand, it would seem that the court could require the branch office to comply with such provisions of the Commercial Code as are within the legal power of the foreign company to perform. This is of great importance in relation to the publication of balance-sheets of the foreign company in Germany. In general it will be proper to assume that the foreign company must comply, as far as its branch office in Germany is concerned, with all conditions provided in the Commercial Code for a branch office of a Germany company, except those cases in which the foreign company is able to prove that according to the laws under which it was organized, it is impossible to meet a special requirement of German law. Therefore the publication in Germany of annual balance-sheets of a foreign joint stock company becomes necessary, although it is not required by the laws of the country in which it is domiciled.

Additional statements are necessary in the event that registration has been applied for within two years after the formation of the foreign company. In this case the name, residence and profession of the subscribers of the memorandum and members of the board of directors, the price at which the shares were issued abroad, and the contribution made by shareholders otherwise than in cash, the different classes of shares issued and other data have to be reported.

After registration of the branch office, which, as a rule, takes a rather considerable time, the foreign company is bound to submit to the court from time to time certified copies of the minutes of general meetings, any changes in the memorandum or articles of association, its annual balance-sheet and profit and loss accounts.

The costs of opening a branch office are not slight, because in addition to the notarial and court fees to which the registration is subject, the foreign company must pay a tax of 4 per cent. on all assets belonging to the branch office.

As a branch office does not constitute a separate legal entity, it follows that the foreign company is liable for all debts and obligations of the German office, and for anything done or omitted by the same. Accordingly, anyone is entitled to sue the branch office in Germany and to seize by way of execution the property of the foreign company in Germany and to satisfy the judgment to the extent of the property seized.

Under these circumstances it is not astonishing that this form is very rarely used and rather unpopular.

A German Company.—Certainly the most satisfactory method of establishing a permanent business enterprise in Germany is to organize a German company. Its advantages are first of all that a company registered according to the laws of Germany and having its principal office located therein is considered to be of German nationality regardless of the fact that its entire capital is owned or controlled by foreigners. The doctrine according to which the nationality of a company is determined by the nationality of the stockholders or of the majority of its stockholders is not recognized in Germany. Therefore the restriction imposed upon foreign companies, to wit governmental approval for the acquisition of real estate, would not be applicable.

The statutes dealing with the formation and administration of a company are laws enacted by the German Republic and apply to all companies having their main office in Germany. The various Free States of Germany are not allowed to take special legislative steps with the view to amending, supplementing or carrying out the federal company laws.

We may disregard the co-operative societies (*Genossenschaften*) [1] which are not within the scope of this examination. As limited liability will usually be required, we may also leave aside four other business forms involving a partnership liability. They are: (*a*) The "ordinary partnership" (*Offene Handelsgesellschaft*) where the partners are responsible for all debts incurred by the partnership regardless of the amount of their participation; [2] (*b*) the "limited partnership" (*Kommanditgesellschaft*) in which at least one partner assumes an unlimited liability, whereas other partners may restrict their responsibility to the extent of their participation; [3] (*c*) the "dormant partnership" (*Stille Gesellschaft*) which is a limited partnership, with the exception, however, that the limited or dormant partner is not published in the commercial register, but has a subparticipation based on an internal arrangement with the full partner; [4] (*d*) the "partnership limited by shares" (*Kommanditgesellschaft auf*

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[1] The co-operative societies are governed by a special German law called *Reichsgesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften* dated May 20, 1898.

[2] Cf. Arts. 105–160, German Commercial Code.

[3] Cf. Arts. 161–177, German Commercial Code.

[4] Cf. Arts. 335–342, German Commercial Code.

Aktien) which is a remarkable amalgamation showing the characteristics of an unlimited partnership as far as the managers are concerned and of a joint stock company as far as the shareholders are concerned.[1]

The only German companies which constitute separate legal entities and which afford limited liability are the company with limited liability[2] (*Gesellschaft mit beschränkter Haftung*) and the joint stock company (*Aktiengesellschaft*).

Company with Limited Liability.—The company with limited liability[3] cannot be compared with any company form known in the Anglo-Saxon law.[4] It is briefly a partnership with limited liability.

The foundation is very simple and can be effected within a very short time, say one week. Only two subscribers are required. They may be Germans or foreigners, may have their residence in Germany or abroad and may be individuals or companies. They agree in a notarial act on the terms of the charter (*Satzung*), which must specify the name, the location and the object of the company, the nominal amount of its capital, which must not be less than 20,000 Reichsmarks, and the amount of the capital subscribed by each member. As usual the duration of the company is unlimited. The capital must be paid in cash to 25 per cent. of the amount prescribed in the charter. No further provisions are necessary. The subscribers appoint one or more managers (*Geschäftsführer*), who may be the subscribers themselves, and apply for registration with the local court of the city in which the company is to maintain its principal place of business. No special reports or audits are necessary. The registration is published in the German Official Gazette and usually in two daily newspapers.

The costs of such organization are comparatively low. They consist of notarial and registration fees and expenses of publication amounting to not more than approximately the following sums:

	Reichsmarks.		Reichsmarks.
Original Capital . .	100,000	Cost of Organization . .	702
,, ,, . .	200,000	,, ,, ,, . .	1,122
,, ,, . .	400,000	,, ,, ,, . .	2,000
,, ,, . .	1,000,000	,, ,, ,, . .	3,768
,, ,, . .	4,000,000	,, ,, ,, . .	17,880

In addition to these costs an organization tax on capital of 4 per cent. is payable.

Regarding the name there are three important rules: (1) the name must have the suffix "*mit beschränkter Haftung*" (limited), (2) names which do not have a direct relation to the business or which are apt to mislead the public are not allowed, (3) for the purpose of avoiding confusion, the name cannot be similar to that of any other company recorded in the same commercial register. Accordingly, foreign companies may use their own corporate name when organizing a German company. The commercial register of Berlin shows a remarkable increase of companies bearing their foreign names.

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[1] Cf. Arts. 320-334, German Commercial Code.

[2] If we use hereafter the expression "company with limited liability" we mean the English translation for *Gesellschaft mit beschränkter Haftung*.

[3] The usual abbreviation for *Gesellschaft mit beschränkter Haftung* is "G.m.b.H."

[4] It is governed by a special German law called *Gesetz betreffend die Gesellschaften mit beschränkter Haftung* of May 20, 1898, and June 28, 1926.

The capital is divided into as many membership shares (*Geschäftsanteile*) as there are members participating in the organization. The share of each member cannot be less than RM 500 and its nominal amount must equal the amount of his participation. Therefore every member holds only one share. These shares are in no way comparable with those of a joint stock company. They are non-negotiable, cannot be listed on any stock exchange, certificates evidencing the members' rights are usually not issued. The transfer of a share requires a notarial deed and notice to the company, and in some cases the charter requires the consent of the company. These rules illustrate the strictly private character of this kind of company. The affairs of the company are administered by one or more managers (*Geschäftsführer*), who need not own any shares and who may be Germans or foreigners. They are entitled to represent the company in every respect, which power cannot be restricted, as far as third persons are concerned, by the charter or by agreement with its members or otherwise. Accordingly, the company is bound by any legal act performed by its managers irrespective of whether or not the transaction was within the object of the business of the company prescribed in its charter. Of course, its members may claim damages, should the managers wilfully or carelessly exceed their instructions or violate the charter, but such violation cannot affect the position of third persons who dealt with the corporation through its managers.

If the corporation has two or more managers, all documents, as a rule, will be validly executed on its behalf, if signed by two managers. A company seal is unknown to German law.

The management of the company is supervised by the general meeting of its members. Its decision is required in respect of the following matters :[1] (*a*) The approval of the annual balance-sheet and declaration of a dividend ; (*b*) amendments of the charter ; (*c*) the appointment and removal of managers.

The principal task of the general meeting is to approve the annual balance-sheet for the preparation of which the law stipulates rather liberal rules. Generally it may be said that ordinary accounting principles are applicable to the preparation of the annual balance-sheet. The following requirements are, however, interesting : (*a*) Plant and property permanently employed in the business may be valued at its cost price or at the cost of replacement regardless of the fact that its intrinsic value may be smaller, provided that a sufficient sum is written off to cover depreciation or provided that a sum corresponding in amounts thereto has been placed to a replacement reserve ; (*b*) the cost of organization and administration cannot be entered as assets ; (*c*) the amount of the capital indicated in the charter must be entered as a liability. This applies equally to every reserve set up.

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[1] This enumeration shows only the most important cases. The charter may provide for any extension and even for a restriction of the powers of the members of the company.

The corporation is not bound to allocate any profits to a reserve fund before distributing dividends to its members.

No publication of the balance-sheet is required. The company has only to report to the commercial registrar any amendment of its charter or changes in the names and in the amount of participation of its members.

It is apparent that the simplicity of an organization of this kind renders it the most inexpensive to operate. It will also be realized from what has been said that such a company has all of the advantages of a partnership combined with very many of the advantages of a joint stock company. Due to these features the " G.m.b.H." has become very popular. It may happen even that all the shares of the company are transferred to one person who is at the same time not only the shareholder but also the manager, that accordingly the administration and the capital are concentrated in one hand which is usually called the " one-man company." The entire share capital may be transferred to non-residents or foreign companies and the managers may also be foreigners. A foreign company is therefore able to have complete control of a German company administered by its own officers without running the risk of responsibility for its debts.

Joint Stock Companies.—The *Aktiengesellschaft*[1] is a form which, in spite of various material differences hereinafter referred to, may be compared with a joint stock company.[2] It may be used for any kind of industrial, public utility or banking business.[3] It needs a much larger and more complicated organization than the company with limited liability. Accordingly the costs of foundation and administration are higher than those outlined hereinbefore.

The method of organization is that first at least five subscribers (*Gründer*) who may be foreign individuals or companies domiciled abroad agree upon the terms of the charter (*Satzung*). This charter takes the place of the English " memorandum of association " and of the " articles of association " and contains elements of both. It must specify *inter alia* the name, the place of business, the object of the company, the amount of the capital, the numbers of shares subscribed for by each of the subscribers, the different classes of shares, if any, the method of appointment and composition of the managing board and the manner of summoning general meetings of shareholders. As a rule, however, the charter is more elaborate.

Having agreed upon the contents of the charter and subscribed to the capital, the subscribers appoint the supervisory board consisting of at least three persons. The supervisory board nominates one or more members of the managing board. The law does not prescribe that any of the subscribers or board members must have German nationality or a residence in Germany. After the formation of both boards all subscribers and the members of both boards must apply in notarial form for registration of the company and file the notarial acts evidencing the subscription to and payment of at least 25 per cent. of the capital, including the premium if the shares are issued above par, the appointment of the managing and supervisory boards and the charter.

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[1] The usual abbreviation for *Aktiengesellschaft* is " A.G."

[2] We will hereafter refer to *Aktiengesellschaften* as joint stock companies.

[3] The *Aktiengesellschaft* is dealt with in Arts. 178–319 of the Commercial Code.

Although the subscribers are personally responsible for the fulfilment of all formalities in connexion with the organization and for the statements made by them, the managing and supervisory board must investigate all the circumstances of the foundation, particularly the correctness and sufficiency of the declarations made by the subscribers in respect of the subscription and payment for the capital stock and must deliver a written report thereof to the court. In the event that a member of one of the boards is a subscriber, or that any of them has claimed a special advantage or any remuneration in respect to services rendered in connexion with the formation, or any shares have been issued for a consideration other than cash payment, an additional investigation by special auditors appointed by the chamber of commerce must be made. The company is registered in the commercial register of the local court of the city where it is to be located and the essential facts regarding the foundation must be published in the German Official Gazette and in two daily newspapers.

It will be seen that the foundation of an *Aktiengesellschaft* requires a comparatively long time and cannot be completed before the elapse of about three or four weeks. If special audits are necessary this period is even more extended.

Regarding the name of the joint stock company the rules explained above in connexion with the company with limited liability are applicable. There is no legal objection to having a foreign trade name registered provided it contains the word *Aktiengesellschaft*. As a matter of fact the Commercial Register of Berlin shows a considerable number of joint stock companies with English corporate names.

The minimum capital requirement is Reichsmarks 50,000 paid up to the extent of at least 25 per cent. The distinction between authorized and issued capital does not exist in Germany. The entire capital as indicated in the charter must be subscribed and issued and no increase is allowed before the original capital has been fully paid in. No shares may be issued at a discount.

The capital is divided into registered or bearer shares of a nominal amount of Reichsmarks 100 each or any multiple thereof. Shares of no par value are unknown to German law. Although the charter may stipulate different classes of shares, the division into common and preferred shares is unpopular in Germany, as already explained above, and, as a rule, there is only one class of shares with equal rights as to dividends and voting. The shares may be registered in the name of the holder; as a rule, however, almost all the shares issued by German joint stock companies are in bearer form to which dividend coupons are attached. They are transferable by delivery merely without notice to the company. Accordingly, registrar and transfer agents are unnecessary. Stock books are kept by the company only in cases in which registered shares have been issued. Under these circumstances the joint stock company is unable to determine the names of its shareholders except in those cases where the shares are held as permanent investment by a small number of persons.

The joint stock company is in so far rather expensive, as it is administered by three bodies, to wit: (*a*) the managing board, (*b*) the supervisory board, and (*c*) the general meeting of shareholders.

The managing board alone is authorized to represent the company in every respect. It may execute promissory notes, guarantees, debentures and other securities, acquire and dispose of real estate and other assets of the company and represent the same in all legal proceedings. If the *Vorstand* consists of two or more members, documents are executed on behalf of the company by two members of the managing board, who sign below the name without using any seal. Any agreement so executed by the *Vorstand* is absolutely binding upon the company irrespective of whether the managing board exceeded the instructions given to it by the supervisory board or acted outside the scope of the business as laid down in the charter. *Ultra vires* is not a doctrine of German company law and any restrictions regarding the power or authority of the managing board are not binding as against third persons.

The company is also bound in the event that the managing board did not apply for the consent of the board of directors or of the general meeting, although this is expressly provided in the charter for the conclusion of a special transaction, as, for instance, the issue of debentures.

The validity of a document executed by the *Vorstand* is not even impaired by the fact that they have been signed by persons who are no longer members of the managing board but still registered as such in the commercial register. Therefore third persons are fully protected in dealing with joint stock companies if they have ascertained that the persons purporting to be members of the board are still recorded as such.

Of course, it is understood that the members of the managing board are personally liable for damages to the company caused by a transaction which was in violation of instructions of the supervisory board or of the provisions of the charter.

In addition to the powers of the managing board, the company may grant to employees special powers of authorization which must also be entered in the commercial register.

The *Aufsichtsrat* is an entirely separate body and has functions different from the managing board. This is evidenced by the provision that no person is allowed to be a member of both boards. The main duty of the supervisory board is to keep itself informed of all important transactions in which the company is interested. It may demand reports at any time from the managing board and inspect the company's books and records. It must investigate the annual accounts and balance-sheets and report thereon to the shareholders. It calls the general meetings and is entitled to appoint and remove the members of the managing board.

The principal purpose of the general meeting of shareholders is to approve of the annual balance-sheet, the division of profits and the discharge of the managing and of the supervisory board, to consent to any change of the charter, particularly to the increase and reduction of the capital and to appoint and revoke the members of the supervisory board.

For stockholders not resident in Germany it is important to know that voting at general meetings may be exercised by proxies which must be executed by writing signed by the stockholder.

Regarding the preparation of the balance-sheet the statutes dealing with joint stock companies are much stricter than in the case of the company with limited liability. In addition to the provisions explained above, the joint stock companies' securities and merchandises must be valued at the market price of the date of the balance-sheet or at the original cost, whichever is lower. Other assets must be shown at their value not exceeding their cost.

The *Aktiengesellschaft* has to create a reserve fund, usually called its "legal reserve fund," to cover any losses which may be sustained. To the credit of this reserve must be placed: (*a*) at least 5 per cent. of the net profit of each year until the reserve fund equals 10 per cent. of the nominal capital of the company; (*b*) the sums resulting from premiums payable upon the issue of shares above par either upon the formation of the company or the increase of its capital after deducting the cost of issue; (*c*) the sums resulting from payments made by shareholders without any increase in the capital for the acquisition of preferential rights in respect of their shares, unless such sum is allocated to meet any extraordinary amount to be written off or special loss to be covered.

It almost goes without saying that the company may also accumulate extraordinary reserves if provided in the charter.

The balance-sheet, including the profit and loss account, must be published in the German Official Gazette and in the daily newspapers indicated in the charter and be filed in the commercial register, together with a copy of the minutes of the general meeting and of the business report.

Owing to the limited space available the foregoing statements have only explained some basic elements of the company and drawn attention to a number of deviations from the English system. However, more details seem unnecessary in order to realize the differences existing between a company with limited liability and a joint stock company.

Taxes payable by Foreign Individuals or Companies.—The decision as to whether a proposed procedure is advisable cannot be based exclusively on conclusions drawn from the civil and commercial law. Since taxes play a predominant rôle in Germany, it often happens that the solution of a problem, although sound from the standpoint of civil law, is not feasible owing to the heavy tax burden. The latter point of view is of utmost importance because at present no treaty preventing a double taxation between Germany and England has been enacted. Let us therefore analyse briefly the taxes payable by foreign individuals or companies creating one of the above-mentioned organizations.

Income-tax.—The heaviest German tax is the income-tax for individuals and companies [1] and is therefore of special interest. Foreign individuals and companies are not taxable on all their income but only on that part of income derived from specified sources in Germany.

It is necessary first to define terms. A " foreign individual " is a person having no domicile or habitual residence in Germany. Generally speaking, a foreigner remaining in Germany for a longer period than six months is presumed to be a German resident for tax purposes. This is only a presumption and the final decision will depend upon the facts of each case. For instance, a foreigner arriving in Germany with the intention to stay there and to devote all his time to German business cannot escape the taxing liability by leaving the country after an elapse of five months in order to return there again within a couple of weeks. On the other hand, foreigners coming to Germany for the purpose of concluding a specific business without intending to give up their domicile abroad and to remain in Germany more than five months will not be subject to German taxation although they were compelled to stay in Germany for say seven months to consummate the proposed transaction.

The qualification of a " foreign company " is less difficult to determine, as the law bases its decision not on the negative condition as shown above but on the positive fact that the company has according to its charter its head office and principal administration outside Germany. It is hardly conceivable that serious dispute can arise with regard to the interpretation of said rule because in most cases it will be easy to ascertain in which country the management of a company is situated.

If it can be proved that an individual or company has the qualification of a foreigner as described above, the following income only is taxable : (*a*) Income derived from a business for which the foreigner, individual or company maintains an office or has appointed a permanent representative in Germany ; (*b*) interest on obligations secured by real estate situate in Germany ; (*c*) dividends on shares of German joint stock company and companies with limited liability ; (*d*) income derived from a participation as dormant partner in a German business ; (*e*) interest on debentures issued in the open market provided the borrower is located in Germany; (*f*) profits realized from the sale of real estate in Germany provided the acquisition was made for speculative purposes and the aggregate profits in one year exceed 1,000 Reichsmarks.[1]

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[1] The income-tax law for individuals is called *Einkommensteuergesetz* and dated August 10, 1925, whereas the corporate income-tax is dealt with in the *Körperschaftssteuergesetz* of the same date.

Thus a foreigner must pay income-tax on interest received on a loan secured by mortgages on real estate in Germany, but is exempt from such tax if the loan given to a German borrower is secured by the pledge of moveable property situate in Germany. Naturally unsecured loans are also free from taxes. Likewise a foreigner is not assessed in respect of profits realized from speculations on any German stock exchange or from the sale of goods outside the scope of the business. It is to be noted that debentures issued by a German borrower abroad and not listed on any German stock exchange may upon application be released from income-tax by the Reichsminister of Finance with the consent of the Government Counsel (*Reichsrat*) and a committee of Parliament (*Reichstagsausschuss*).

Of the foregoing the item of profits derived from German business is the most important to foreigners having an agency or a permanent representative or a branch office in Germany. No tax is levied, should a foreign corporation during the first year operate in Germany with a loss or show profits only to the extent of its overhead and organization expenses, whereas the principal office abroad was able to make during the same period very considerable net earnings.

If as a result of special arrangements between the foreign head office and the German organization the net profits derived in Germany have been artificially reduced and are evidently in disproportion to those obtainable in similar German businesses, the taxing authority may assess a fictitious income calculated according to the average earnings of similar German businesses or according to the usual interest return on the capital invested in the German office.

In case of a registered branch office the discretionary power of the taxing authority to calculate a fictitious income and to disregard the report made by the tax-payer has been extended. In this case the authority is not required to prove that the reduced income was caused by special arrangements with the foreign firm or company. Accordingly, it would not be sound to advise foreigners to reduce the net profits of their German agency by raising the prices at which raw material and goods are sold to the agency or by reducing the prices at which goods are purchased from the agency because the calculation of the artificial income by the German authority may lead to a very heavy tax burden.

Should a foreigner be deemed to have acquired a permanent residence or domicile in Germany, he is required to pay taxes on all his income derived after the acquisition of such residence or domicile irrespective of the source and of the country in which it has been obtained and irrespective of the fact that it may have been assessed abroad. A transfer of the income by such person to his wife with a view to evade taxes would not help him, because according to German law the tax-paying husband is assessed on his personal income and that of his wife and has to report both to the taxing authority.

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[1] The foregoing enumeration is incomplete. We have omitted some sources of income which are of less interest to foreigners, as, for example: income derived from an agricultural or forestry business or earnings from leased immoveables in Germany.

A further disadvantage involved for persons subject to taxation applicable to residents is that the authority has discretion to assess in lieu of the reported income the aggregate amount of annual living expenses if such expenses are at least 15,000 Reichsmarks per annum and exceed the reported income by at least one-half. Accordingly, income-tax would be payable on capital in the event that as a result of small earnings a tax-payer is forced to use capital in order to support his family. If, therefore, as a result of the transfer of the property by a foreigner to friends abroad (except his wife or children of minor age) for the purpose of avoiding double taxation, the balance of his income is not in proportion to his expenses he must bear in mind that he might be assessed on the aggregate amount of his annual living expenses.

However, foreigners, although subject to unrestricted income-tax, enjoy a valuable privilege. The Reichsminister of Finance is authorized to release foreigners intending to remain in Germany for the period of the first five years of their stay in respect of income made abroad or to compromise on a lump sum payable as taxes in lieu of taxing the real income. Therefore foreigners may expect to pay during the said period a considerably lower tax than permanent German residents. For the assessment of the net income resulting from a business all expenditure made to obtain, maintain and secure profits and interest payable on loans may be deducted. The usual depreciation for buildings, machines and inventory is allowed. The annual amount of depreciation is calculated according to the number of years; buildings, machines and inventory can be used and is expressed in a percentage of the original cost.

The district tax officers have been authorized to publish general rules specifying the annual average rates for depreciation which they will approve. For Berlin they are as follows: For factory buildings, 2 to 4 per cent.; for ordinary machines, 5 per cent.; for special machines, 10 to 15 per cent.; for working tools and implements, 33⅓ per cent.; office furniture, 3 to 5 per cent.; typewriting machines, 15 to 20 per cent.; passenger motor-cars, 10 to 15 per cent.; transport motor-cars, 15 to 20 per cent.

The tax-payer may in certain cases take a higher rate of depreciation provided he is able to justify the same by extraordinary circumstances. If, for example, the value of patents diminished materially as a result of new inventions a much higher depreciation is allowed.

Depreciation for a stock of goods is not permitted. They are appraised in the balance-sheet according to the price at which they can probably be sold on the date the balance-sheet is drawn up.

The law provides also that a loss incurred in one year may be compensated against profits made in succeeding years.

The income-tax for individuals differs for persons subject to unlimited tax and for foreigners subject only to the limited income-tax and varies according to the amount of the annual net income, as follows :

On an annual income up to RM 8,000 the tax is 10 per cent.
On any excess up to RM 4,000 the tax is 12½ per cent.
On any excess up to RM 4,000 the tax is 15 per cent.
On any excess up to RM 4,000 the tax is 20 per cent.
On any excess up to RM 8,000 the tax is 25 per cent.
On any excess up to RM 18,000 the tax is 30 per cent.
On any excess up to RM 34,000 the tax is 35 per cent.
On any further sums the tax is 40 per cent.

It results therefrom that net earnings above the equivalent £4,000 or more are taxed to the extent of 40 per cent., which, of course, constitutes an extremely heavy burden.

On the other hand, foreigners subject to restricted income-tax have a rather important privilege. Although regarding earnings derived from the German business the above tariff is also applicable, income resulting from capital sources, as, for example, interests on mortgages or other rights secured by real estate and on debentures, dividends from shares of German joint stock companies or companies with limited liability, earnings from a participation as dormant partner in a German business, is submitted to a 10 per cent. tax deductable at the source.

Company Income-tax.—The company income-tax is similar to the income-tax for individuals. A main difference is that even in the event that no income is made but a loss is shown in the balance-sheet, the company must pay a tax on the annual compensation paid to the members of its supervisory board. The company income-tax is a flat 20 per cent. of the net profits irrespective of the amount. Smaller companies with limited liability are excepted from this tax. They have the benefit of being taxed similarly to individuals. An exception is also made for German companies holding at the beginning of the fiscal year at least 25 per cent. of the shares of another German company. The dividends derived from such holdings do not constitute taxable assessable income.

A German company is required to deduct from the dividends payable to its shareholders a 10 per cent. coupon tax. The shareholder may, however, credit himself with the payment of this tax in his income-tax return.

Foreign companies are bound to pay 20 per cent. on their income derived from business in Germany, whereas in respect of the income realized from capital sources referred to above, only a 10 per cent. tax is payable. But this is of no practical importance because generally all the income made by companies in Germany will always be considered to be business income, and it is hardly conceivable that a company realizes profits outside the scope of its business activity.

Property Tax.—The property tax (*Vermögenssteuer*)[1] distinguishes likewise between residents and non-residents. A resident person or company is taxed on all property of whatsoever nature owned by them irrespective of its location; foreign persons abroad and companies must pay an annual tax only on certain property located within Germany, such as real and personal property which constitute a business unit. Therefore no tax is payable on securities of any kind, objects of art, cash, motor-cars, furniture, etc., in Germany acquired for private and not for business purposes. On the other hand, a German resident is required to pay this tax also on real estate taxed outside Germany and on shares, insurance policies and other assets constituting his private property.

The assessment is made according to the net value of the property, appraised in accordance with the specified rules.

The rate is rather modest; it amounts to:

·1 per cent. if the net property value does not exceed RM 10,000.
·2 per cent. if the net property value exceeds RM 10,000 to 20,000.
·3 per cent. if the net property value exceeds RM 20,000 to 30,000.
·4 per cent. if the net property value exceeds RM 30,000 to 50,000.
·5 per cent. if the net property value exceeds RM 50,000 to 250,000.
·55 per cent. if the net property value exceeds RM 250,000 to 500,000.
·6 per cent. if the net property value exceeds RM 500,000 to 1,000,000.
·65 per cent. if the net property value exceeds RM 1,000,000 to 2,500,000.
·7 per cent. if the net property value exceeds RM 2,500,000 to 5,000,000.
·75 per cent. if the net property value exceeds RM 5,000,000.

In addition to the property tax a special tax is imposed on individuals charging the increase of the property values during one fiscal year, but this law has been suspended for the present and will not come into force again before the next year or even a couple of years.[2]

In consequence of the Dawes Plan, which requires the issue of industrial debentures at the aggregate amount of 5 billion Goldmarks with interest at the rate of 5 per cent., to be amortized in annual instalments of 1 per cent., Germany enacted the law pertaining to the Industrial Charge (*Industriebelastungsgesetz*).[3] Whereas according to this law only the largest German industry has to execute bonds to be deposited with the trustee, additional legislative steps were taken to the effect to have all business enterprises, whether belonging to industry, commerce, banking or any other trade, participate in the proportion of the value of the assets as appraised for the property tax in the payment of the service of the industrial debentures.[4] This contribution, which is imposed upon all German business undertakings, constitutes from the legal aspect a real tax and is fixed annually by special ordinance. It amounts for the calendar year of 1929 to ¾ per cent. of the value of the property belonging to the business. Whether this tax will be repealed as a result of the Young Plan has not yet been decided.

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[1] The law governing the said tax is called *Vermögenssteuergesetz* dated August 10, 1925.

[2] The law is called *Vermögenszuwachssteuergesetz* dated April 8, 1922.

[3] The *Gesetz über die Industriebelastung* is dated August 30, 1924.

[4] This law is called *Gesetz zur Aufbringung der Industriebelastung* and is also dated August 30, 1924.

There are therefore three different taxes on property, to wit: the ordinary property tax, the tax charged upon the increase of property values and finally the industrial debentures tax.

Turnover Tax.—Besides the income and property tax the German Government assesses a turnover tax on a change in possession of goods in the ordinary course of business in the amount of ¾ of 1 per cent. of the purchase price in the case of a sale or on the assessed value in the case of a change of possession.[1] As the amount of this tax is usually added to the sale price by the seller, it is borne by the purchaser. To facilitate the importation of goods from foreign countries, the first sale of imported goods in Germany is exempt from the turnover tax. Also the first turnover in Germany of certain imported goods of general importance, as raw materials and various partly manufactured goods, is not taxed. No tax is payable on the exportation of goods by the producer or by the exporter. This privilege has been extended in favour of commission merchants and the carriers provided certain conditions specified in the law are complied with.

Capital Tax.—The capital tax (*Gesellschaftssteuer* or *Kapitalverkehrssteuer*) has already been referred to in dealing with the formation of companies. It amounts to 4 per cent. of the capital and applies to the original capital stock and all increases thereof and to certain loans made to companies (joint stock companies and companies with limited liability).[2] A company must pay this tax once only on the consideration received by it for the issuance of its shares. Likewise transactions intended to minimize this tax, such as making loans to the company instead of increasing its capital, are taxable. The tax applies to all loans whereby the creditor may not claim interest but receives a share in the net profits of the borrowing company, or if the creditor is not allowed to call the loan or to assign his rights under the loan agreement as long as he is also a shareholder. For the same reason loans given by shareholders to the company are taxable if such loans can be considered to be a necessary investment for the conduct of the business or if it represents in fact an increase of its capital. If, therefore, loans are made to companies in which the lender holds shares either personally or through a trustee, this capital tax will be due and payable.

The capital invested by a foreign company in its branch office is also subject to this tax, whereas no tax is payable if the foreign company appoints an independent agent to operate the business.

In case of a merger of two German companies or of a reorganization of a company for the purpose of eliminating losses by reducing the capital stock and increasing it thereafter the tax amounts only to 2 per cent. of the consideration paid for the newly issued shares.

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[1] The turnover tax is governed by the *Umsatzsteuergesetz* of December 24, 1918—May 8, 1926.

[2] This is provided in Arts. 2–24 of the so-called *Kapitalverkehrssteuergesetz* of April 8, 1922.

Security Tax.—Should the company finance its business by issuing bonds or debentures to bearer with interest coupons, their aggregate nominal amount is subject to a security tax (*Wertpapiersteuer*) of 2 per cent.[1] Shares of foreign companies issued in Germany are subject to a tax of 4 per cent. of the issuing price. With regard to securities issued by a German borrower abroad and not listed on any German stock exchange the Reichsminister of Finance has discretionary power to reduce the tax from 2 per cent. to ½ per cent.

Tax on Transfer of Real Estate.—A special German tax is imposed upon the transfer of real estate, securities and goods listed on an exchange.

The tax on the transfer of real estate (*Grunderwerbssteuer*)[2] payable by the purchaser constitutes a rather heavy burden. It amounts to 3 per cent. of the purchase price and is usually increased to 5 per cent. by reason of surtaxes levied by the States and Communes.

Municipalities are authorized to tax the increase of value of real estate consisting of the difference between the acquisition and selling price, the so-called *Wertzuwachssteuer*, the tariff of which varies in the different cities and depends on the duration of time the seller has been the owner of the land. Its aim is chiefly to assess profits realized from speculations in immoveables.[3] No surtax is assessed in case German joint stock companies and companies with limited liability deliver on account of the purchase price for the acquisition of real estate or of a part thereof their own shares to the seller.

The periodical real estate tax amounting to 1 to 2 per cent. payable every ten years of uninterrupted ownership has been suspended for the present.

The tax on the sale of private securities listed on a German stock exchange (*Börsenumsatzsteuer*)[4] is ·1 per cent., of shares of joint stock companies ·15 per cent. and of shares of companies with limited liability ½ per cent., said percentages to be calculated on the purchase price. However, foreigners residing abroad and foreign companies are exempted when dealing with foreign partners and not with German residents or companies.

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[1] The *Wertpapiersteuer* is dealt with in Arts. 25–34 of the *Kapitalverkehrssteuergesetz.*

[2] This tax is governed by the *Grunderwerbssteuergesetz* of September 12, 1921, and March 11, 1927.

[3] According to the ordinance enacted by the City of Berlin on April 18, 1929 (*Wertzuwachssteuerordnung der Stadt Berlin*), the profit realized upon the resale of real estate within one year from the date of its acquisition is subject to the tax of 60 per cent. provided such profit exceeds 110 per cent. of the original purchase price. Said tax is reduced proportionately if the duration of uninterrupted ownership was longer than one year and/or the above difference between purchase and selling price amounts to less than 110 per cent.

[4] The *Börsenumsatzsteuer* is dealt with in Arts. 35–60 of the *Kapitalverkehrssteuergesetz.*

Trade Tax.—We have given above a survey of the main taxes levied by the German Government in which foreigners might be interested. The taxing power of the Federal States and Municipalities in Germany has been largely restricted since the war, as they share a certain proportion in the sums collected by the Federal Government on account of income, property and turnover taxes. The only important tax reserved to the States and Communes is the trade tax (*Gewerbesteuer*). In the Free State of Prussia, for example, each business firm pays 2 per cent. on its annual net income exceeding 3,600 Reichsmarks and $\frac{2}{3}$ per thousand per annum on its business capital exceeding 1,200 Reichsmarks, for which latter tax ·1 per cent. of the aggregate amount of salaries and wages payable annually to employees and workmen may be substituted. In addition, every province is entitled to levy a surtax the amount of which varies largely in the different cities.[1]

Interpretation of Tax Statutes.—The bulk of taxes assessed on businesses in Germany as outlined above does not seem very encouraging to foreigners intending to extend their activity to Germany. Foreigners will have also to bear in mind that the German courts having jurisdiction over tax matters do not recognize the rule followed in some countries that the law levying a tax should be construed most favourably to the tax-payer. On the contrary, German courts are inclined to take the broadest possible interpretation in favour of the government. This policy is also supported by the law[2] stipulating that tax provisions must be interpreted according to their object and economic sense. No tax-payer is, of course, prevented from using methods intended to minimize the tax burden. In the event that a strict interpretation of statutes dealing with taxes would lead to severe injustice or inequity, the Reichsminister of Finance is authorized to waive the tax wholly or in part or to reimburse taxes already paid. This discretionary power relieves to some extent a rather severe tax law. It will be observed that each case must rest on its own facts, and accordingly only general principles can be set forth in a survey of this kind.

General Conclusions.—Having examined the different types of organization suitable for the purpose and doing business in Germany, and having explained the tax system, it may be permitted to draw the following general conclusions.

Attention has been called to the disadvantage of a registered branch office in Germany. It was found that legal formalities, particularly the filing for free inspection by anyone of annual balance-sheets and profit and loss accounts and of papers relating to changes or amendments to its by-laws, must be complied with. We also pointed out that registration involves not only notarial and court fees, but also the payment of an organization tax. Finally, we referred to an arbitrary fixing of income for tax purposes if the taxing authority should be of the opinion that net profits of the branch office are disproportionate to those realized by German similar businesses.

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[1] For instance, in Berlin every business is bound to pay for trade tax 1 per cent. on the aggregate amount of salaries and wages (*Lohnsummensteuer*) and 8½ per cent. on its net income. This includes state and municipal trade tax and is a low percentage in comparison with other Prussian cities such as Cologne and Frankfort.

[2] Compare Arts. 4 and 5 of the *Reichsabgabenordnung*, which law contains a modification of the general principles of the entire German tax system and specifies *inter alia* the jurisdiction of the taxing authorities, the remedies of the tax-payer and the criminal offences in taxing matters.

Prima facie the registered branch office looks attractive to a foreign company which is anxious to utilize its goodwill in extending its activity to Germany. It is admitted that this is a real advantage, but as already explained, the trade name of a foreign company may be used with the suffix *Aktiengesellschaft* or *Gesellschaft mit beschränkter Haftung* by a German company formed by it. Therefore, this advantage is not of a great practical importance. In any case, this point of view does not seem apt to compensate the serious inconveniences above referred to.

The " correspondent office " is a suitable form if foreigners wish to decide later, depending on how events turn out, whether conditions warrant a permanent organization in Germany.

The foundation of a company with limited liability can be unconditionally recommended for the following reasons. It constitutes an independent legal entity, involves no personal liability of its shareholders except to the extent of shares subscribed and not paid for, its foundation and registration can be completed in a very short time and without large costs, its administration is of extreme simplicity, its entire capital may be concentrated in one hand, its shareholders and managers may be all non-residents, and there is no necessity to publish any financial statements.

If the bulk of business to be developed in Germany should require a larger organization and it would seem advisable to issue negotiable bearer shares in order to have a larger distribution of stock, the *Aktiengesellschaft* is the only possible and proper form.

Summarizing, the foregoing explanations will confirm the general opinion that the law does not present any serious difficulties to foreigners who desire to do business in Germany and that there are various possibilities of procedure ; whether one way or any other is preferable can be decided only after careful consideration of the special circumstances of each case. Details cannot be discussed and do not seem necessary for the purpose of giving a preliminary introduction of the German system. In any case it is obviously wrong to think that the heavy tax burden prevents foreigners from establishing their business in Germany, especially in view of the fact that German taxes are to a great extent compensated by the duties on importation of goods.

JOHN SELDEN AND JEWISH LAW.[1]

[*Contributed by* Dr. Isaac Herzog, *Chief Rabbi, Irish Free State.*]

The Revival of Learning offers a particular interest to the Jewish student of history. That reawakening of the human mind heralded the dawn of a new era, of an era which was destined eventually to draw at least a portion of the Jewish race from its forced seclusion and bring it into close contact with the cultural activities of the outside world. But there is also quite another aspect from which that turning-point in the cultural history of Europe appeals to us most intimately. The Renaissance did not confine itself to the resuscitation of classical antiquity, but also brought about the reawakening of a deep interest in Hebrew scholarship. Christian savants in many European centres of learning began to apply themselves with an ever-increasing zest to the study of Hebrew, and, gradually widening the scope of their studies and researches, they also began to pay considerable attention to Talmudic and Rabbinic literature.

Whilst it could hardly be maintained that England led the way in that direction, she could point to at least one Hebraist, who as far as concerns Rabbinic erudition has had very few equals among non-Jewish scholars.

Selden's Writings on Jewish Law.—John Selden (born in 1584 at Salvington, Sussex, died in 1654, at London), a renowned Jurist and Orientalist, and a man who actively participated in English political life, was undoubtedly one of the most erudite men that England had ever produced. But although his learning was of encyclopædic range, its most arresting feature is, I think, presented by his writings on Jewish law as embodied in the Talmud and Rabbinic literature.

In order to judge for myself as to the importance of Selden's work in this field, I decided to read no reviews or criticisms of Selden until I had covered the whole of his Rabbinic writings from beginning to end and had formed an independent opinion free from all external influences.

History of Tithes.—Selden's *History of Tythes* (1617) is a work which is of interest to the general student of English political institutions and of the relations between Church and State in the British constitution. It involved its learned author in serious trouble. Selden begins the history of tithes with Melchizedek (Genesis xiv. 18), and he traces it throughout the Bible and Talmud to Maimonides' code. And yet I would hardly include the *History of Tythes* in the list of Selden's *Rabbinica*. Talmudic-Rabbinic matter occupies relatively a very small space and the work is chiefly founded upon non-Jewish authorities. It is hardly correct to say, as the Jewish Encyclopædia puts it, that Selden based his heretical views upon Rabbinic sources. The paragraphs dealing with the Jewish aspect present, on the whole, though not entirely, an accurate and fairly methodical account of the institution of tithes according to the Talmud and are free from the intermingling of extraneous matter, which mars so much of Selden's subsequent work. I noted with a particular interest a casual reference to the question of the restoration of the Temple. Selden reports an answer given by learned rabbis to the query addressed by Christian scholars whether the sacrificial cult would be restored in the event of historical developments rendering that possible. The answer was to the effect that this would be barred by an insuperable difficulty owing to the fact that there could no longer be found *Kohanim mejuhasim*, or claimants of Aaronic descent who could establish their claims by genealogical records. I may mention that this question was raised some seventy years ago in connexion with the movement for colonizing Palestine initiated by the saintly and philosophical rabbi, Hirsch Kalisher of Thorn, Prussia, whom I would regard as the real founder of modern Zionism. Many of the leading rabbis of the day then pointed out the same difficulty, contending that the restoration of the sacrificial worship would be legally impossible until prophets once again arose in Israel, who, by the divine light vouchsafed to them, would clear up all doubts in regard to the *Yehusê-Kehunah*, or the claims of Aaronic descent.

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[1] Paper read before the Society for Jewish Jurisprudence, at the Inner Temple, February 1930.

Law of Inheritance.—The *De Successionibus in Bona Defunctorum*, or *On the Law of Inheritance* (1631), is really Selden's first effort in the realm of Jewish law. It covers every phase of the subject, and whilst one may detect an inaccuracy here and there, it is, generally speaking, a correct presentation of the Jewish law of inheritance. Selden's characteristic love of digression already begins to manifest itself—as witness, for instance, his introduction of *hekedeshot* or gifts made to the sanctuary, anent the subject of disinheriting—but it is still kept within limits. On opening the book you might think that Selden had an easy task before him, for did he not find everything laid down in Maimonides' code under the title *Naḥaloth*, or Inheritance ? But our author in reality covers much more extensive ground than is comprised in Maimonides' code under that particular title. He culls together from other parts of Maimonides' code materials bearing upon his subject and incorporates them under appropriate heads. Thus, for instance, in dealing with the status of females under the law of inheritance, Selden introduces the *takkanoth*, or enactments made by the sages, which aimed at ameliorating the position of the Jewish female in that connexion. He likewise treats of the law of levirate marriage (Deuteronomy) in relation with the law which invests the levirate brother marrying the wife of his deceased brother with the right of succession to the latter's property (*Yebamoth* 40*a*).

Here Selden waxes rather discursive and adverts at great length to the form of release known as *halizah* (Deut. xxv. 7–10). The student of

Jewish history will note with interest Selden's casual reference to Leon de Modena, whom he describes as "at present officiating in the capacity of Chief of the Synagogue at Venice."

Now and again our author directs attention to parallels and analogies in Roman law. Thus, for instance, he tries hard to find some analogy in Jewish law to "adoption" which figures largely in Roman law, but he concedes in the end that there is no real analogy. An example of a lengthy digression may be found in the discourse on the laws of *Gêrut*, or conversion to Judaism, in connexion with the law affecting the estate of a proselyte who died intestate.

The year 1636 saw the publication of *De Successione in Pontificatum Ebraeorum* (*On Succession in the Hebrew Priesthood*) dedicated to Laud. This, too, is fairly accurate and is not overlaid with digressions.

Universal and Particular Law.—As a set-off, however, we have the next work, *De Jure Naturali et Gentium Juxta Desciplinam Ebraeorum* (1640). Here Selden gives unbridled vent, on the barest pretext, to his exuberant learning. The title displays a trait of originality. No one before Selden had so emphatically called attention to the analogy which Jewish law offers in this connexion with Greek and Roman jurisprudence. The analogy can hardly be carried far, but it is none the less interesting. Our sages divide the commandments of the Torah into two distinct categories: (*a*) Commandments specifically given to Israel as the chosen people and only binding upon Israel; (*b*) Commandments given by a pre-Mosaic revelation to the whole of the human race, or the children of Noah—*Bene Noah*, to use Talmudic phraseology. The latter are termed Noachide Commandments, *Miṣwoth bene Noah*, and they embrace the monotheistic principle, including the prohibition against the worship of images, and the fundamentals of common morality, which comprise the administration of justice (*dinin*). As no specific legal rules were divinely communicated for the guidance of mankind in general, it follows that the children of Noah were expected to evolve systems of law on the basis of natural justice. This distinction between universal and particular law is of great importance in the development of Greek and Roman jurisprudence—particularly of the latter. The title "De Jure Naturali et Gentium" was thus calculated to focus general interest. Selden, however, could not very well confine himself to the purely juristic aspect of the distinction between universal and particular law, for whereas in Roman law, for instance, the recognition of the principle of natural justice applicable to aliens reacted powerfully upon the evolution of the law, this was not the case in Jewish law. Selden, therefore, had to cover a much wider field and treat fully of the whole gamut of the Noachide commandments. As illustrative of the lengths to which Selden can go, I may instance the view he expresses in the opening chapters that very probably Pythagoras heard Ezekiel delivering his prophetic addresses, and hence, as a logical consequence, Greek jurisprudence was indebted to Jewish law. In addition to the seven Noachide commandments, our author treats of Noachide sacrifices, of the Sabbath, of proselytes, discussing the distinction between the full and the half-proselyte (*ger Ṣedek* and *ger toshabs*) and adducing parallels from the Roman law of citizenship. He likewise deals with the powers of the Crown (*mishpat hamellukhah*) in Jewish law; with polygamy, excommunication, divorce, the law of lost property, poor-law; with charity—whether part of universal or particular law; with capital punishment, money-changers in the Temple in Jerusalem, Herod's legal status, the Jubilee year, the concluding of treaties, slaves, usury, war and peace, levies and tributes, the Roman imperial titles, etc. etc. We can see at a glance that Selden tries to be exhaustive. But he succeeds in doing much more than that: he exhausts the patience of the reader. As far as he can trace it, he also treats of international law in Judaism. While most of his excursions are bound to tire the reader, one sometimes feels grateful for an interesting remark, or quotation here and there, although not relevant to the subject-matter. Thus in discussing the prohibition against idolatry, Selden offers a few very illuminating observations on the shameful charge of ass-worship so often made against our people by classical Pagan writers.

The following is an intriguing example of Seldenian discursiveness. In treating of manifestations of religious zeal, a theme which is hardly an organic part of the "De Jure," Selden adverts to the incident related in the New Testament, how the founder of Christianity threw down the tables of the money-changers, and chased away the pigeon-dealers in the Temple courts. This, he thinks, was an instance of the manifestation of religious zeal. "Were those dealers mere traders selling pigeons for sacrificial purposes, or were they rather what the Talmud calls *Mafrihey Jonim* (*Sanhedrian* 24*b*), gamblers who staked bets on race-pigeons?" The question, of course, betrays hopelessly muddled exegesis, but it affords Selden an opportunity for expatiating upon the law which disqualifies gamblers from giving evidence in a court of justice and upon a variety of kindred matters. One cannot help wondering how a legally trained mind could allow itself to be drawn into such aberrations and fly off at a tangent in such wise.

Yet, when all has been said, one cannot help admiring "De Jure," in some ways, as a monument of industrious research and of intellectual energy, though not of intellectual power.

The Jewish Calendar.—Having exceeded all bounds of pardonable digression in "De Jure," Selden consciously or unconsciously made atonement for this serious defect in the next work, *De Anno Civili* (1644). This is a treatise on the Jewish Calendar, and it is chiefly noteworthy for the attention it called to the doctrines and practices of the Karaites, the unorthodox, anti-Talmudic sect which at one time created a commotion in Jewry, but which by now has almost disappeared. After the storm had subsided and there was no longer occasion for polemics, Jewish writers practically ignored the Karaites from orthodox motives, while Christian authors spoke little of them owing to sheer lack of knowledge. " De Anno " brought the Karaites into the limelight.

I consider " De Anno," which gives a lucid and methodical account of the history of the Jewish Calendar, and of its principles and rules, as one of Selden's best Rabbinical works. It is no easy matter to discover the method which Selden generally follows in the arrangement of his materials. Often the effort to trace his method proves in the end to have been a wild-goose chase, and sometimes one feels disposed to exclaim: " It may be method, but there is madness in it." " De Anno," at all events, exhibits something like logical methodicity.

Marriage and Divorce.—*Uxor Ebraica seu De Nuptiis et Divortiis Veterum Ebraeorum* (1646), *On the Jewish Law of Marriage and Divorce*, is, on the whole, a very creditable performance. It is comparatively free from mistakes and presents a good summary of the Jewish Law of Marriage and Divorce and of the status of the married woman under Jewish law. The principal themes treated in " Uxor Ebraica " are: Forbidden marriages, marriages of priests, polygamy, royal marriage, remarriage of one's divorced wife, levirate marriage and release, *Kiddushin*, or the legal form of marriage, seduction, conjugal rights and duties, proprietary rights acquired by marriage, adultery and its punishment, betrothal and consummation of marriage, the moral aspect of divorce, Noachide marriage and divorce, marriage and divorce under duress, the bill of divorce (*Get*), etc. An instance of digression not altogether unpardonable is Selden's account of the schools of Hillel and Shammai, which he compares with the Proculian and Sabinian Schools of Roman law. This occurs in connexion with his discussion of the attitude of the schools of Shammai and Hillel respectively towards divorce. His statement of the Talmudic-Rabbinic view of divorce, which he compares with the New Testament view, is by no means unfair. Excursions abound here too, but not to anything like the extent we meet with in the " De Jure." " Uxor Ebraica," while it is not over-discursive, affords ample evidence of Selden's wide reading in Rabbinics.

Jewish Courts.—We now reach Selden's last effort in the field of Rabbinics—*De Synhedriis Veterum Ebraeorum*. The first part of this work appeared in 1646, the second in 1653, and the third and last was published after the author's death. The work exceeds by far the limits suggested by the title—which, by the way, was calculated to interest Christian readers very keenly in view of the well-known references to the Sanhedrin in the New Testament. The principal themes treated in this very voluminous work are the Seven Noachide Commandments (already dealt with in " De Jure "), the status of the *proselyte of the gate*—pre-Mosaic courts of justice, capital punishment, the penalty of excommunication beginning with Adam (who, according to the *Agodah*, lived in a state of excommunication for 130 years), the ineligibility of women for the office of judge—here Selden quotes interesting parallels from Roman law and from the Canon law—ordination of judges, Noachide courts, the requisite number of members for constituting courts of law of the various grades, the Seventy Elders endowed with the Divine Spirit who formed the first great Sanhedrin, or Supreme Court in Israel, the Christian dogma of the Trinity and the *Kabbalah*, officers charged with enforcing the law, *Shoterim*, penalties inflicted for the infringement of the law, the different kinds of tribunals, *Batê Dinim*, Courts of Arbitration, references to Jewish courts in the Roman codes, Jewish courts outside of Palestine, the semblance of the Sanhedrin in Babylonia, the laws of the paschal sacrifice, the regulations concerning the constitution of the great and small Sanhedrin, the provincial Sanhedrins, the three Higher Courts which sat within the Temple area, the Supreme Court or Great Sanhedrin, its powers and functions, the High Priest and the Great Sanhedrin, the origin of the term *Sanhedrin*, the Patriarch, Nasi, or Chief of the Sanhedrin, the King and the power of the law, the priestly courts, *Batê Dinim shel kohanim*, the oath administered by courts of law, oaths and vows in general, the law of the rebellious elder, the public sacrifices, the Temple-treasury, etc. etc. Needless to say, the work is overloaded with irrelevant matter, and yet, on the other hand, it is very incomplete in certain directions. One would hardly expect the law of oaths administered by courts of law to appear in a work purporting to give an account of the history, constitution and functions of the Jewish courts, but since the subject has been brought in, Selden might have done far better, if, instead, he had allotted more space to legal procedure in general. "De Synhedriis" ends abruptly in the midst of an excursus which affords one more striking illustration of Selden's gusto for digressiveness. According to the *Mishnah*, no addition could be made to the courts of the Temple, nor could any extension be made of the city area of Jerusalem without the authority of the Supreme Court or Great Sanhedrin. The dedication of any such addition or extension required the participation of that august body. Selden is, of course, amply justified in treating of this aspect of the functions of the Great Sanhedrin, but dedication leads him on to a discourse on the rededication of the Temple by the Maccabean victors, and this induces a mass of information on the dedication of Pagan temples and Christian churches; and here the work stops, as the author unfortunately died before he was able to complete his last treatise on Jewish law.

General Estimate of Selden as a Writer on Jewish Law.—The general estimate of Selden as a writer on Jewish law, reflected in the article published in the *Dictionary of National Biography*, is not far from the truth. What is emphasized in that article is Selden's extraordinary Talmudic-Rabbinic erudition. Nothing is said there of any evidence of originality in the treatment of his materials, or of scientific historical analysis. That Selden was by no means lacking in intellectual power, or critical acumen, is amply attested by his *De Diis Syris*. But within the ambit of Talmudic-Rabbinic literature he was not really a master, and he did not and, in fact, could not write as such. Even the extent of his Talmudic-Rabbinic learning so eulogized in the above article is, to my mind, subject to considerable qualification. The *Dictionary of National Biography* states that Selden's critics charged him with drawing largely upon secondary sources and the excuse is offered that probably he had no access to the original sources. I cannot entirely agree with this statement. The original sources of Jewish law and ritual are the Bible, the *Tanaitic* commentaries on the Pentateuch, such as the *Siphra*, *Siphre*, *Mechilta*, the *Mishnah*, the *Tosafot*, or extra-Mishnaic-Tanaitic compendiums, and the two *Talmudim*. To all these Selden certainly had free access and he quotes them freely. Selden's principal source of information, it seems to me, was Maimonides' code, for whose author he entertained a degree of admiration amounting to reverence. From Maimonides, and, in some measure, also from Rabbi Moses of Coucy's standard compilation of law and ritual—the *Sepher Hamiṣwoth*—he would appear to have worked his way backwards to the first-hand sources with the exception of the Bible, for which he required no assistance from later sources. My impression is that Selden never made a systematic study of the Talmud and can hardly be described as a Talmudist in the proper sense of the word. A Talmudist, for instance, would not repeatedly quote the standard commentary on the ninth chapter of the tractate *Baba-Bathra* in the Babylonian Talmud under the name of *Rashi*, for the merest tyro knows that *Rashi's* commentary on *Baba-Bathra* ends in the third chapter on p. 29. Even specialists are liable to make mistakes. But no Talmudist could have possibly blundered so miserably as Selden does in his translation and construction of the passage quoted from Sanhedrin, p. 59*a*, in Book 3, chapter 9, of *De Jure Naturali et Gentium*. What is really remarkable is that Selden is generally correct in his construction of the Talmudic and Rabbinic texts upon which he draws. He appears to have studied chiefly the *Mishnah*, the kindred Tanaitic sources and Maimonides' code which is composed in the idiom and style of the *Mishnah*, but he had not applied himself to the close study of the *Gemara*, or the Talmud properly so called, and he thus never acquired the Talmudic *technique*. The intricate Talmudic dialectics couched in the Babylonian-Aramaic idiom he would seem to have never mastered. As far as it was possible for him he tried, it seems to me, to verify the statements in the secondary sources by referring to the original sources, but sometimes he cites well-known sayings of the Talmudic sages—both *tanaim* and *amoraim*—upon the authority of the mediæval Rabbinic commentaries on the Bible, such as Rashi, Kimchi and Abarbanel, presumably because he was unable to locate the passages. Yet, strange to say, in some cases he appears to know more than the standard commentators on Maimonides' code. Thus, the commentators indicate *Babli Sanhedrin* 56*b* as the source of Maimonides' dicta on Noachide divorce from the standpoint of Jewish law, but this is only partial, the full source being *Yerushalmi*, *Kiddushin*, i. 1. Selden gives the reference to the *Yerushalmi*. Evidently he picked this up in some late Rabbinic work. We can hardly credit him with a wider knowledge of the Palestinian Talmud than Maimonides' commentators, including Joseph Caro, the author of the *Shulchan Aruch*, the last standard code. That women are ineligible for the office of judge is implied in the Babylonian Talmud, but it is only in the Palestinian Talmud (the *Yerushalmi*) that this is explicitly stated. Yet Selden can only quote as his authority for this legal incapacity of women so late a source as Gedaliah Ibn Yechaiah's *Shalsheleth Hakabbalah*, which is not at all a legal work, but a very unreliable chronicle. He did not find this law expressly laid down in Maimonides' code and was therefore at a loss to trace it, but it is strange that he did not take the trouble of looking up Jacob ben Asher's *Tur*, or Joseph Caro's *Shulchan Aruch*, where he would have found it clearly stated.

Selden's reading of Rabbinics was not really so extensive as is generally supposed. He derived considerable information from the works of the Buxtorffs, father and son, and from the writings of other Christian Rabbinists. He certainly read a great deal of Maimonides' code and also of the other early compilations, such as the *Halakhoth Gedoloth*, the *Sepher Hamiṣwoth* of Moses of Coucy, the *Sepher Hahinukh* of Aron Halevi, but he had no near acquaintance with the later post-Maimunistic standard-codes, the *Tur* and the *Shulchan Arukh*. Thus he refers his readers for fuller information on the constitution of the ordinary tribunals composed of three members to Jacob ben Asher's *Arba Turim sub titulo Sanhedrin*, but there is no such title in Jacob ben Asher's code; the subject is treated under the title of *Dayanim*.[1] In dealing with polygamy Selden commits a blunder unworthy of the merest beginner. He could find in the Talmud no authority for the prohibition against polygamy, but he is puzzled by a statement in Rabbinic sources that Rabban Gamaliel placed a ban upon polygamy and he becomes hopelessly entangled. The source of the trouble is that he wrongly resolved the abbreviation R.G., *i.e.* Rabbenu Gershom (an authority of the eleventh century of the common era), into Rabban Gamaliel.

Selden's extraordinary diffusiveness is attributed in the *Dictionary of National Biography* to the fact that his memory was overloaded with learning. Each point suggests to him a collateral subject which tempts him. He cannot resist because his mind overflows with knowledge. I do not quite agree with this. My own view is that Selden is often digressive of set purpose. In a great many instances the extraneous matter which he introduces is not at all collateral to his theme. The experienced eye can see him forging the link. It appears to me that our author was anxious to give to the world all that he had ever poured out upon paper, and he therefore tried by every conceivable manner of device and contrivance to incorporate in his works as many of his numerous monographs, essays and notes as he possibly could.

According to the *Dictionary of National Biography* Selden was charged by his critics with projecting into the past, or in other words, with assuming that the Talmudic statements give an absolutely faithful picture of the ancient Israelite polity. It is true that Selden, in his *Rabbinica,* is by no means critical, and yet it seems to me that he had armed himself against attacks of that nature. Whatever the titles of his works may convey, their general trend gives the impression that his aim is to render a faithful account of the ancient Israelite polity, not necessarily as critics may conceive it, but as it is described by the Talmudic and Rabbinic masters. If the critics are dissatisfied, let them fight it out with the Talmud and the Rabbis. This is no direct concern of his works as planned by him. Nevertheless, there can be no doubt that Selden had great faith in Jewish tradition, which represented to him the vehicle of the true meaning of the Law of Moses. He generally treats the sages of the *Mishnah* and the Talmud with the profoundest respect and now and again he censures even Jewish Biblical exegetes like Ibn Ezra and Ralbag for giving interpretations at variance with tradition. With Christian writers, both Catholic and Protestant, who ignore Jewish tradition in explaining Pentateuchal laws he deals very summarily. This, says Selden, is like attempting to interpret Roman law independently of the standard Roman jurists, Ulpian, Papinian, etc.

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[1] In Maimonides' code this comes under Sanhedrin and hence Selden's mistake.

What strikes one as a really serious blemish is Selden's failure to appraise the relative values of his materials. Not every dictum or statement found in the Talmudic and Midrashic sources was meant to be taken as embodying ancient tradition. Great care and discrimination must be exercised. Selden was woefully lacking in discrimination. One instance, which, by the way, is not without a touch of humour, will, I think, be sufficient for our purpose. In trying to trace references to the existence of courts of law in pre-Mosaic times, our erudite author seriously discusses a passage in the *Midrash Rabbah* (Genesis l) which speaks of the five High Court judges in Sodom over whom Lot presided as Lord Chief Justice. A sense of humour and a little insight into the nature and tendency of Midrashic exposition might have saved Selden all this trouble. The very names of those justices of Sodom should have led him on to the right track. Think of such names as *Rab Sheker,* " Master Falsehood " ; *Keçin Sheker,* " Sir Falsehood " ; *Rab Nabal,* " Master Villain," etc. ! And yet, despite all this, Selden here and there reflects a correct idea of the nature of the *asmakhtoth,* or elaborate and far-fetched Scriptural supports often adduced by the *tanaim* and *amoraim* for laws or teachings derived from oral tradition, or instituted by the sages. Our author now and again warns the reader that they must not regard these as intended to be taken for textual interpretations in the real sense. Needless to say, Selden in this connexion exhibits no originality, but simply reproduces what he had read in Rabbinic sources.

His Knowledge of Jewish History.—The student of Anglo-Jewish history will find in Selden many an interesting reference to the history of the Jews in England, but his knowledge of Jewish history, particularly of the post-Talmudic period, was, indeed, very defective. He discourses, for instance, at considerable length on *Semikha*, or ordination, and he discusses learnedly Maimonides' view about the possibility of restoring Rabbinic ordination, discontinued for centuries, but he is totally unaware of the attempt made in that direction by Jacob Berab in Safed and frustrated by Levi ben Habib of Jerusalem, not so very long before Selden. The barest acquaintance with post-Talmudic Jewish history would have saved him from the pitfall into which he fell in connexion with the subject of polygamy in Jewish law.

As if to make up for his deficiency in our history Selden wrote a *Treatise on the Jews of England* (1617). I expected a more or less appreciative outlook from a man who devoted so much time, energy and thought to the Talmud and Rabbinics, but I suffered bitter disappointment. It is saddening, in the extreme, to see a man of his wisdom, encyclopædic knowledge and wide reading in Jewish literature repeating inherently absurd libels about the Jewish people. In his "Table Talk," Selden speaks, it is true, in quite different tones of the Jewish race, but hardly in a manner to atone for the grievous sin he had committed in the "Treatise." I must add, however, that my estimate of Selden has not been influenced in the least by his disparaging statements in the above "Treatise."

On the whole, the general estimate of Selden as a Rabbinic scholar is, I think, rather exaggerated. The *Dictionary of National Biography* asserts that he attained a degree of proficiency in Jewish learning "equalled by very few non-Israelites." I would rather say that very few *non-Talmudists*, Israelite or non-Israelite, have reached Selden's level of Talmudic-Rabbinic erudition. It is really uncanny that a man who certainly was not a Talmudist should have been able to produce what Selden has produced in the domain of Rabbinica. Lastly, I would remark that if, instead of launching out on his own, he had simply produced a translation of Maimonides' code, he would have rendered far greater service to learning. And yet, after all, Selden's Rabbinic works stand out as a most striking and arresting phenomenon in the seventeenth-century literature of Europe in general and of England in particular.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

British Opinion and the Statute of Westminster.—Surprise has sometimes been felt in the United States at the complacency with which the British public has viewed the changes in the constitution of the Empire agreed upon by the Imperial Conference of 1930. The grounds, however, for this attitude are substantial, apart, of course, from the fact that such questions have no popular appeal, and are appreciated by a mere fraction of the electorate. In the first place, the results of the Conference were the logical sequence of a slow process of evolution ; if they appear startling to other countries, that is largely because there has existed a very imperfect appreciation of the vital changes in the relations of the Dominions to the Empire even since 1900. Secondly, it is realized that the formal relaxation of control to be carried out means no loss of any power actually exercised. The spectacle of the deportations from Canada of settlers who proceeded thither under the encouragement of the British government and in part at its expense, simply because they cannot find work, is a conclusive reminder of the inability of the British government to exercise any authority even in a matter in which its expenditure might give it a moral right of protest. Again, the threat of the New South Wales government to refuse payment of interest on its oversea indebtedness revealed the fact that the legal machinery available would be of no practical utility in compelling payment, and the decision of the Commonwealth to assume the burden, though clearly according to law, was indubitably aided by generous concessions in the postponement of repayment of war debt by the British government. If power cannot be exercised, and if its existence causes dissatisfaction in any minds, why retain the nominal authority? Thirdly, as regards external relations, it is recognized that the coming into being of the League of Nations has created a situation which has enabled the distinct personality of the Dominions to develop in a manner impossible with safety under the pre-war regime, and additional security has been achieved through the Kellogg Pact. It is further admitted that it is difficult, if not impossible, for the Dominions to appreciate European issues, and that their distinct individuality permits the United Kingdom to engage herself, as in the case of the Locarno Pacts, in a manner which would have been most embarrassing, had it been necessary to include the Dominions in the engagements then taken. Moreover, as the May Economy Committee recognized, one inevitable result of the new status is that the British government must cease to be responsible for the naval protection of the whole Empire as in the past, and the Dominions must either increase their expenditure or decide in the light of their position that they do not require defence, which naturally has been the view of Canada and apparently also of the Irish Free State and the Union of South Africa. Under pre-war conditions co-operation was absolutely essential, but the United Kingdom accepted full responsibility ; that feature cannot endure, but the way for co-operation remains open. In foreign affairs again the logical course for the Dominions is doubtless that sometimes urged in South Africa and the Irish Free State to establish legations and consulates on a lavish scale, but here again the British government will evidently remain willing long to afford aid, and thus to relieve the finances of the Dominions. But responsibility for their attitude to foreign Powers will rest with their governments alone, save in so far as the British government desires to lend its weight to their views, as in the case of the sinking of the *I'm Alone*. In view of these considerations, it becomes natural that a minimal interest has been shown in the Imperial Parliament in the terms of the Statute of Westminster.

Dominion Views of the Statute.—New Zealand at the Conference of 1930 showed plainly hesitation to welcome the new proposals as necessarily an improvement on the old, and secured her right to adopt at pleasure the terms of the new statute, so that it remains for her to wait and see the operation of the changed regime before finally homologating it. Newfoundland has wisely followed the same example. It is clear, indeed, that the position of a territory of the size and population of Newfoundland is hardly compatible with the full exercise of Dominion status, and, having regard to the pressing financial difficulties of the situation, it is not surprising that the debate on the acceptance of the Statute should have elicited the protest that, the further the territory got away from England, the worse it would be for Newfoundland. Finally, by agreement it was decided that the Statute must contain a clause providing that none of its provisions should apply to Newfoundland as part of the law thereof, unless adopted by the Parliament of the Dominion, and in adopting any provision effect might be given from the date of the Statute or from such date as the adopting Act might provide. This form of enactment has obviously a decided flaw, for in theory it would be possible for the Newfoundland Parliament to give *ex post facto* effect extraterritorially to an Act which had no such effect originally, but it may be assumed that no such procedure would be contemplated. In the Union the passage of the resolution seeking legislation gave rise to the issue whether or not the effect of the new system would be to permit the Parliament to amend its constitution with plenary authority, that is without regard to the conditions expressly laid down in the terms of s. 152 of the South Africa Act, 1909. The essential issue, of course, is the protection given to the native franchise in the Cape, and the problem was certainly not without difficulty, though General Hertzog was insistent that it was not for a moment proposed to alter the safeguards of the constitution. It might, however, be argued that with the cessation of the application to the Union of the Colonial Laws Validity Act, 1865, the restrictions in the constitution lost their binding force, resting on that measure, so that the Union Parliament would come as regards constitutional change to be in the same position of unbounded sovereign authority as the Imperial Parliament itself. On the other hand, it was contended that the constitution remained unimpaired, resting as it did not on anything imposed by superior authority but embodying the compact arrived at by the representatives of the former colonies, that it could be changed only in virtue of the procedure set out therein, and that the courts of law would be bound to refuse to accept any change not carried out in the approved manner. Finally, by concurrence, the acceptance of the Statute was made " on the understanding that the proposed legislation will in no way derogate from the entrenched provisions of the South Africa Act." It was made clear that it was not desired to have any clause to this effect inserted in the Imperial Act ; the effect of such a resolution would be sufficient as the expression of the national will, and certainly it is difficult to imagine either that the understanding would be disregarded by the Parliament itself, or, if disregarded, that effect would be given by the courts under normal conditions. It remains surprising that the Union was content to allow the Imperial Statute to operate automatically in the Union, without asking that its operation should be dependent on Dominion legislation, which was the obvious manner of asserting Dominion autonomy, side by side with the legal sovereignty of the British Parliament. Little, happily, was said of the demand for the right to secede, and the spokesman who reasserted the right candidly qualified his assertion by insisting that no mere majority in Parliament could expect secession to be conceded. Doubtless the issue is not dead ; there is no doubt of the strength of the Republican feeling in the former Republics, but General Hertzog's change of view and acceptance of Dominion status as adequate secures for the time being that the issue will sleep. In strict law, of course, the acceptance of the Statute with its requirement of the action of the whole of the Empire for a change in the succession negatives the right to secede, and there the matter may well rest.

The Attitude of the Commonwealth.—The propriety of securing the full control of the Commonwealth Parliament over the application to the Commonwealth of Imperial legislation evoked a perfectly justifiable amendment to the Statute from Mr. Latham, who objected to the suggestion that it might be open for a Dominion government to ask the Imperial Parliament for legislation. The wording of the proposed clause in the Statute was clearly open to the accusation of vagueness, for, though a Dominion government is presumed to be subject to the control of its Parliament, there is no reason why the application should not be made formally on the authority of Parliament. The real solution of any such difficulty is that pointed out by the action of New Zealand[1] at the Conference of 1930; any Imperial legislation ought to be subject to acceptance by the Dominion Parliament, and Mr. Latham evidently appreciated this position. Mr. Hughes once more reiterated his objections to the whole procedure of 1926. The Balfour resolution had been due to the complete inability of certain Dominions, newcomers to the table of the Empire, which were unable to appreciate the nature of the Imperial pact, and erroneously believed that it limited their sovereignty, demanding such a modification of the constitutional relations of the Dominions with the United Kingdom as would enable them to pose before the world as independent nations. They had insisted, therefore, on putting into writing what could not be reduced to a formula. He approved Mr. Latham's views as matters had gone so far, but would much have preferred to see only amendment of the Colonial Laws Validity Act and the Merchant Shipping Act. It is, of course, easy to point out that the present position must be traced back directly to the determination which was pressed at the time by Mr. Hughes to give the Dominions distinct seats on the League of Nations, but Mr. Hughes's attitude is easy to understand. The Commonwealth and New Zealand, in view of their position in the Pacific, cannot hope to maintain their security and their policy of racial exclusiveness without the aid of the United Kingdom, and Mr. Hughes, who all his life has advocated the necessity of this relationship, recognizes that every step which relaxes the bonds relieves the United Kingdom from the obligation of protection and relegates the Commonwealth to the more precarious assurances of the League Covenant and the Kellogg Pact. As a realist he does not share the current belief in the permanent assurance of peace or oriental acceptance of the White Australia Policy.

The Position of the Irish Free State.—How little the Balfour resolution has done to win over Republican opinion in the Irish Free State was shown by the attitude of the leaders of the Fianna Fail party towards the proposal to approve the enactment of the Statute of Westminster. Mr. O'Kelly reaffirmed the determination of the party to secure independence and to leave no stone unturned to break the remaining links between Ireland and the United Kingdom. It cannot be said that the government showed any enthusiasm for the Imperial connexion. When Mr. Lemass taunted the administration with its failure to bring down legislation to abolish the appeal to the Privy Council, Mr. McGilligan merely pointed out that some time must elapse before the measure could be passed, as it was difficult legislation. It is clear, therefore, that the Free State remains determined to secure the abolition of the appeal. The legal position is extremely obscure, but there is no doubt of the fact that the British government, when the Treaty of 1921 was agreed to, thought that by giving the new Dominion the status of Canada it was ensuring the existence of the appeal, and that it insisted effectively on the insertion of the appeal in the Irish Free State constitution in the face of the deliberate refusal of the Free State in its own draft to admit the right. Further, it is clear that the appeal has been rendered nugatory in practice by the steps taken by the Irish Parliament to defeat its exercise; the net result so far of the attempts to exercise the right have been to impose on the British Treasury a heavy burden of payments to Irish Civil Servants, and to excuse a company payment of costs. In these circumstances statesmanship suggests that the surrender by the British government of the right to appeal would be justified if in return the Free State accepted the obligation to refer to an impartial tribunal, composed of nationals of the Empire, any issues affecting the position of the minority community in the Free State which arose from alleged violations of the Treaty, and which were deemed by the British government sufficient to justify an arbitral award. This would remove any possibility of vexatious processes, and many Irish Republicans have advocated the doctrine that arbitration is the just method of solving disputes between the two countries. At present the Free State claims to be judge of her own cause, an attitude which always evokes the suspicion that the cause is unjust.

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[1] *Journal of Comparative Legislation*, Third Series, vol. xiii, pt. i, p. 27.

The Canadian Attitude.—After some slight hesitation on the part of Quebec, it has fortunately been possible for all the provinces to agree to the Statute, subject to the most explicit enactment of the doctrine that the constitution of Canada must not in any way be made liable to alteration by the effect of the Statute. This means, of course, that, save in the region of merchant shipping, the Statute brings no freedom to Canada, which remains in the unhappy position of having no normal method of constitutional change. It must be pointed out to those who now urge that there is no constitutional ground for consulting the provinces before affecting the constitution that the procedure adopted as regards the Statute of Westminster has negatived their view, since the assent of all the provinces was formally asked and obtained. Practice in these matters outweighs all other considerations. No doubt it is necessary to assure Canada her due autonomy that assent must be brought about for the alteration of the existing constitution by the Dominion herself, but the latest discussion in the House of Commons on the issue revealed a confusing mass of suggestions without any clear tendency to agreement, and it must be remembered that the House of Commons does not speak for the provinces. It is fairly clear that the safeguards for language and education could not be varied save by unanimous assent; but must all the provinces agree to vary the distribution of powers between them and the federation? Or might the passage of a measure in the Parliament, say by a two-thirds majority in each House, and the assent of the majority of the Provincial legislatures be adequate to authorize change? No doubt in matters not bearing on provincial rights the power of change could be accorded to the Dominion Parliament itself by suitable majorities. But again should not the Upper House of the Dominion be made truly federal by means of election by the provincial legislatures? All these issues appear at present insoluble, and it is rather ominous of the difficulties of early progress that Ontario is now represented as regarding the existing constitution as a security for her rights as much as was once the case with Quebec, where, despite the firmness of the provincial Premier in holding to the existing constitution, a section of the Dominion representatives of the province has adopted the attitude of insistence on independence long associated with the name of M. Bourassa.

The Appeal to the Privy Council.—The Statute raises at once the issue whether it will now be possible for the Dominion to abolish outright the appeal to the Privy Council. The Union government has expressed no decision on an issue which has no substantial practical importance for the Union, since the appeal is seldom resorted to and no constitutional issue has so far ever turned on it. The view of the Free State is wholly against it, as noted above, while in the other Dominions there is no movement of importance regarding it. The legal position in Canada is not wholly simple. The Federal Parliament may, under s. 101 of the British North America Act, provide for the constitution, maintenance and organization of a General Court of Appeal for Canada, and it has done so, leaving intact the right of the Privy Council to hear appeals by special leave in civil matters, and denying the right in criminal matters. The denial was clearly *ultra vires* under the Judicial Committee Act of 1844, and was so pronounced in the unhappy case of *Nadan* v. *The King*,[1] for the ruling of the Judicial Committee, though inevitable, was without profit to the appellant and on the other hand evoked annoyance in the Dominion. The cessation of the application of the Colonial Laws Validity Act to the legislation of the Dominion will enable the Dominion to override the Act of 1844, provided always that the safeguarding of the constitution as finally enacted by the Statute is not construed so as to maintain the *status quo* on this head, a contingency which seems very improbable, but which cannot be pronounced definitely upon until the final form of the Act is known. It must, however, be added that in the leading case a suggestion was thrown out that it might not be possible for the Parliament of Canada to affect action done in England where the grant of leave to appeal takes place and where the appeal is heard. Whatever the value of that contention, the grant by the Statute of extra-territorial authority should render the point of no importance, apart altogether from the fact that it would be easy for the Parliament, once the Act of 1844 was overridden, to prevent any application for leave to appeal being sent from Canada. There remains, however, the appeal direct from the provinces, which at present is regulated by Imperial Orders in Council or local Act or is allowed by special leave of the Privy Council. For the Dominion Parliament to legislate to shut off the appeal may be regarded as impossible in civil matters, for it cannot be deemed to inhere in the right to create a federal Court of Appeal, in view of the fact that the appeal direct has so long existed as an integral part of the actual constitution, and the safeguarding of the constitution would doubtless be held to prevent such action. The provinces, however, if given freedom from the Colonial Laws Validity Act, could probably, and if accorded extraterritorial authority could certainly, under their legislative authority in judicial matters extinguish the appeal. The reasoning in *Nadan* v. *The King* and the decisions in *Cuvillier* v. *Aylwin*[1] and in *R.* v. *Eduljee Byramjee*[2] are sufficient to remove doubts on this head. But chaos would result unless all the provinces acted together, for otherwise the Privy Council might decide on appeal in one sense, and another case be decided by the Supreme Court in the opposite sense. The conflict which took place in Australia between the High Court and the Privy Council[3] must not be allowed to occur again. The abolition of the appeal, therefore, apart from legal considerations, must clearly be a matter of agreement and concerted action so far as civil matters are concerned. It must be noted that the number of appeals brought even on issues with no question of constitutional importance arising seems to prove a distinct admiration for the Privy Council.

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[1] [1926] A.C. 482.

The Criminal Appeal.—As regards criminal matters the federal power extends to the regulation of criminal procedure under s. 91 (27) of the constitution, and the abolition of the appeal to the Privy Council from any provincial courts and from the Supreme Court may be effected by simple act of the Dominion Parliament, when the Statute is passed. It ought, however, to be noted that the abolition of the criminal appeal in itself as regards ordinary crimes means in practice nothing, as the Privy Council refuses to act as a Court of Criminal Appeal. But there may be difficulties arising under the efforts of the Dominion and the provinces to use their powers of criminal legislation, and of imposing penalties,[4] respectively to enforce measures which may be *ultra vires*. Thus it may happen that the Supreme Court pronounces valid a Dominion measure when its validity arises in a criminal cause, and no appeal would lie, while in a civil cause the same issue might otherwise be decided by the Privy Council. The issue is one which so far has not been seriously investigated, but deserves consideration.

The Criminal Legislation of the Dominion.—The importance of the question appears from the decision in *Proprietary Articles Trade Association* v. *Attorney-General for Canada*,[5] which has decided the validity of the Combines Investigation Act, 1927, and of s. 498 of the Criminal Code punishing the formation or operation of combines injurious to trade.

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[1] 2 Knapp, P.C. 72. See Keith, *Responsible Government in the Dominions* (1912), iii, 1358, 1359.

[2] 5 Moore, P.C. 276.

[3] Keith, *Responsible Government* (1912), iii, 1366–70.

[4] *Chung Chuck* v. *R.*, [1930] A.C. 244. See Keith, *Journal of Comparative Legislation*, Third Series, vol. xii, pt. iv, pp. 286, 287.

[5] [1931] A.C. 310.

It was held in the *Board of Commerce Act*, 1919[1] case that the Board of Commerce Act and the Combines and Fair Prices Act, 1919, of Canada were *ultra vires*, and naturally the validity of the measure enacted to replace them in 1923, and consolidated in 1927, was called in question. But there can be no doubt of the contrast between the measures condemned by the Privy Council and the new provisions. Under the latter there is a definition of action which is made criminal, and, even if this definition includes matter not hitherto included under criminal legislation, there is nothing in the nature of the acts penalized to render them unsuitable for punishment in the interest of the public. The question of guilt will be determined in each case by a court using the ordinary judicial procedure of indictment. While preliminary inquiries by a Commissioner or Registrar are provided for, there can be no penal consequences, nor are such reports even made evidence. Penal consequences are attached to the breach of orders for securing evidence, but these are clearly legitimate provisions in support of an enactment otherwise valid. On the other hand, the former legislation gave power to the Board of Commerce to prohibit accumulations in the case of non-traders, to compel sale at prices fixed by it, to regulate profits, to exercise its powers in respect of articles of domestic production, and to investigate on their merits individual cases. These actions clearly could not fall under criminal law. Even in the new measure there are provisions which cannot be upheld on that score, namely power to reduce customs duties and to revoke patents, but these sections are justified by the federal power of taxation (s. 91 (3)) of the constitution and as to patents (s. 91 (22)). As the whole ambit of the legislation was thus covered, the Privy Council found it unnecessary to discuss the extent of authority of the Dominion under s. 91 (2) trade and commerce. But it went out of its way to correct the impression, created not unjustifiably by the language[2] of the decision *In re the Board of Commerce Act*, 1919, that recourse could be had to that power only in support of a general power which Parliament possessed independently of it. The meaning of s. 91 (2) will have to be elucidated when it is definitely appealed to in circumstances when the Privy Council cannot avoid construing it; probably it would be found apposite if the interesting issue[3] of the power of the Dominion in regard to trade marks should ever be definitely raised in the courts. The obvious tendency of the Privy Council to explain away its former dicta is supported by the decision of the Court of Appeal in Saskatchewan[4] holding that the Grain Marketing Act, 1931, of that province is invalid as an effort to regulate trade and commerce and not merely an enactment dealing with property and civil rights within the province. The result is all to the good, for it can hardly be doubted that the tendency to minimize the effect of s. 91 (2) ran counter to the nature of a federal constitution, under which wide authority in matters of trade and commerce should normally be exercised in the national interest by the federal authority.

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[1] [1922] 1 A.C. 191.

[2] *Toronto Electric Commrs.* v. *Snider*, [1925] A.C. 396, contains a like doctrine.

[3] See Professor W. P. M. Kennedy, *Can. Bar Rev.*, viii, 711–17.

[4] *Grain Marketing Act*, 1931, *In re*, (1931) 2 W.W.R. 146.

The Dominions and the General Act.—It is impossible to regard with much enthusiasm the decision of the United Kingdom to accede to the General Act for the Pacific Settlement of International Disputes. The gravamen of the objection to the Act is, of course, that temperately urged by Sir A. Chamberlain, that it would, if effective, tend to take away from the usefulness of the League Council which has developed a most effective technique for dealing with those non-legal disputes which are the most dangerous causes of international disagreement. The reservations made by the British government are indeed a practical admission of the disadvantage of departure from that course. But the real difficulty is that the reservations of subjects from the operation of the acceptance are so large as to render the acceptance of almost a nominal character. They include disputes arising prior to the accession, or relating to situations or facts prior thereto, an exclusion of the most sweeping nature, and open further to the objection that the last portion is hopelessly ambiguous ; disputes between the British members of the League of Nations ; and disputes respecting questions which by international law are solely within the domestic jurisdiction of States. The inclusion of such disputes as the last mentioned is necessary to calm the fears of Australia lest immigration restriction be brought into question, but at the same time it cuts away the most valuable feature of the General Act, which was expressly drafted in order to meet the need for some means of dealing with issues which cause friction between States and yet are not of a legal character under international law. Granting that the exclusion was inevitable, the acceptance of the Act becomes of little real value. The exclusion of inter-Imperial disputes has raised the usual controversy with the Irish Free State, which has accepted *sans phrase*, and which asserts it as certain that the British reservation, despite the acceptance of it by the governments of Canada and the Commonwealth, is ineffective. This claim, of course, cannot be taken seriously. No tribunal could possibly hold itself entitled to deal with inter-Imperial issues when the British accession explicitly refuses to permit their inclusion. The League, of course, welcomes even imperfect acceptance of the Act, but *de facto* the Council must remain the real authority to deal with issues which fall outside the scope of legal settlement through the Permanent Court, and in special with the necessary adjustments of national policies which are essential in the long run for the preservation of peace. No pacts will suffice to prevent war, unless there evolves an effective organization to solve the grave difficulties which now arise from the competition of purely national policies. On the other hand, it is impossible to accept the claim of the Free State that inter-Imperial issues should be referred to external authorities ; it would mean that the same right would have to be conceded to India, and that in due course the issue of the treatment of Indian nationals in the Dominions would be settled by external opinion.

The Irish Free State and Foreign Affairs.—In its attitude on the General Act the Free State is, of course, merely asserting its determination to be regarded as a wholly autonomous and independent State. The same motive explains the decision to secure the use of a new seal to replace the Great Seal of the Realm in connexion with instruments for employment in foreign negotiations. The essential feature of this procedure, on which much reticence has been observed, is presumably that it will eliminate the intervention of a British minister who has at present to accept formal responsibility for the affixing of the Great Seal to instruments for the negotiation and ratification of treaties, and similarly will render it needless to secure Imperial action in the appointment of ministers to foreign States. It appears, however, to be intended that the signature of the King shall still be appended to such documents, thus placing on the Crown the rather invidious obligation of acting directly on the advice both of British and of Irish ministers. The obligation of consultation between members of the Empire on all negotiations still remains under the Conference Resolutions of 1926 and 1930, so that there is change in form rather than substance ; but it seems unfortunate that the more constitutional course was not taken of asking for the formal delegation of the treaty power from the King to the Governor-General. No doubt in the normal course of events the King is not likely to be asked to assent to action which would run counter to the interests of the British people, but the contingency might arise, in which event His Majesty might have the unpleasant duty of refusing to act, or of identifying himself with measures inimical to the interests of the great majority of his people.[1] The question will doubtless have to be faced in due course and its implications effectively discussed, but the objections to a delegation of authority seem less serious than are those against the placing of the Crown in a position of embarrassment. If, indeed, the Crown were not possessed of any authority but must act automatically on ministerial advice, the issue would be simpler. But such a position is neither desirable nor actual, as has just again been shown by the active and valuable, but strictly constitutional, aid afforded by the King[2] in the formation of a National Government in August in the United Kingdom. Ultimately in the United Kingdom the effective control of the misuse of authority by a ministry can rest only with the Crown, a fact which is too often overlooked in the Dominions when the analogous case of the authority of the Governor-General is raised.

The Governor of New South Wales and Ministers.—The issue of the position of the Governor has been fought out hotly in the New South

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[1] Compare Mr. Hughes, cited in Keith, *The Sovereignty of the British Dominions*, p. xvii.

[2] The Governor of New South Wales vainly endeavoured to secure national action in the crisis in New South Wales, his Prime Minister objecting to his suggestion of discussion of the issues with opposition leaders.

Wales Parliament in the effort of Mr. Lang's ministry to dispose of the opposition of the Upper House. It survived the struggle under the earlier ministry of Mr. Lang, when Admiral Sir D. de Chair finally refused to add to its numbers sufficient members to secure its consent to its extinction,[1] and the succeeding ministry endeavoured to safeguard the Council by adding to the Constitution Act, 1902, a new clause 7A, which provided that the Council could not be abolished without a referendum to the electors, and that the new clause could not be repealed save in the same way. On Mr. Lang's victory in 1930 he secured the passing through both Houses of two Bills, one to repeal the clause and one to abolish the Council, the Upper House for various reasons accepting the measures. The issue then rose of their legality without a referendum which Mr. Lang did not desire to hold. An injunction was duly issued by the Supreme Court of the State forbidding their presentation for the Governor's assent, and on appeal the High Court of the Commonwealth upheld the decision of the court below by a majority of three to two.[2] The essential point at issue was whether the legislation attacked was a legitimate provision of limitations on the change of the constitution such as is contemplated under the Colonial Laws Validity Act, 1865, s. 5, which contemplates the exercise of constituent powers by Parliaments but subject to the measures being passed in such manner and form as may from time to time be required by any Act of Parliament or colonial law for the time being in force. It would have seemed natural to assume that the legislation attacked was exactly of the kind contemplated by the Colonial Laws Validity Act, and this was the view taken by Rich, Starke and Dixon JJ., Starke J. accepting as accurate the views of constituent powers expressed in my *Imperial Unity* (1916). Gavan Duffy C.J., however, dissented, holding that the words of the Imperial Act might be reduced to what seems the meaningless truism that the amending Act must be passed by the House or Houses of Parliament, a view which certainly cannot be ascribed to the framers of the Act of 1865. McTiernan J. also dissented, but his precise doctrine is a little obscure and hardly convincing. Constitutionally the matter seems absolutely clear; the abolition of the Council ought to proceed from the will of the people, and the attitude of Mr. Lang is, of course, explained by the fact that, when the same issue was put by referendum to the Queensland electorate, it refused to accept the reduction of the legislature to a single House, and the refusal of Mr. Lang to continue payment of the interest on external debt rendered it unlikely that on a referendum the abolition of the Council would be approved.

The Limits on the Action of the Governor.—The inability thus to secure a single chamber led inevitably to renewed efforts of the Premier to obtain such a number of appointments to the Upper House as would effect the same result. The terms of the Bills which he asked the Council to pass were of a most remarkable kind. The Industrial Conciliation and Arbitration Bill conferred the most remarkable powers of controlling industry virtually on nominees of the government; the Reduction of Interest Bill reduced to 3 per cent. all interest paid on governmental securities; the Emergency Income Tax Bill contained provisions of unprecedented character in the direction of confiscation. It is not surprising that the Governor felt unable to swamp the Council which, of course, has received strong infusions of Labour nominees—fifty out of eighty-three members—in order to force through such measures, to which he might have felt it very difficult to assent. This resulted in the assertion by the Assembly, and the denial by the Council, of his inability to refuse the advice of his ministers. On that issue there can be really no doubt; the discretion to refuse advice is given by the Royal Instructions, and the only question is whether it is wise to exercise it. When a Governor feels that he should do so, the ministry's position is clear; it ought, if the issue is vital, to offer to go to the country if the Governor will give a dissolution, and normally the Governor would feel inclined to allow the voice of the people to decide.[1] Or it can resign and leave the responsibility to the incoming ministry to advise a dissolution. In fact, Mr. Lang did not resign or advise a dissolution but appealed to the Secretary of State for the Dominions to overrule the Governor, a demand indirectly countered by Mr. Thomas's insistence on the independent position which must be given to a Governor and his responsibility of action in view of his local knowledge. It was, on the other hand, suggested by members of the opposition party that the Governor might take the initiative and dismiss ministers, but there is no doubt that such a step, legal and constitutional as it is in emergency, is best avoided, and that the attitude adopted by the Governor was in accordance with the best tradition of New South Wales. The value of his intervention was seen in his refusal to yield to the later demand made for the coercing of the Council into accepting the Bill to reduce official salaries to a maximum of £500, with the result that a more reasonable compromise Bill was adopted, the Governor voluntarily accepting a very large reduction of emoluments. Moreover, his firmness had an important share in inducing his ministry to come to terms with the Commonwealth government and preventing a grave divergence of federal and State views.

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[1] Keith, *Responsible Government in the Dominions* (1928), i, pp. xvi, xvii, 143, 144.

[2] March 16, 1931. I owe information on this point to the courtesy of Mr. David Maughan, K.C.

New South Wales and the Commonwealth.—The issue between the two governments arose from the refusal of New South Wales to supply the sums due in respect of interest and sinking fund on the loans taken over under the constitutional amendment by the Commonwealth on terms involving contributions by the State. The breach of good faith was not merely unjust to the Commonwealth, but it affected all the other States, for, though there was some unfortunate delay in the intimation of the determination of the Commonwealth to accept its legal obligations in the matter, it was perfectly clear in law that the Commonwealth was responsible for the payments to oversea creditors, a fact of which the Secretary of State hastened to remind the Commonwealth, while the Imperial government gave the substantial aid of postponing interest and sinking fund repayment of the Commonwealth war loan. It is unfortunate to have to record that Mr. Lang's excuse for repudiation was that Australia had not been treated as generously as France or Italy regarding war debt, ignoring the fact that the loans in question were being paid for on very favourable terms, giving no profit to the United Kingdom, while the borrowing had been at rates which the Commonwealth could never have received on her own credit. The Commonwealth necessarily determined that it must resort to legal proceedings to make good the sums it expended, and writs for the sums due were duly issued. Before decisions could be given, the Governor's steady opposition to confiscatory measures, followed by the impossibility of paying interest on internal debt or official salaries in view of the refusal of further banking accommodation, forced the State to yield in August, and to promise to rejoin the Loan Council, to meet the interest, etc., charges on the debt, and to carry out retrenchment on the basis adopted by the Commonwealth and the other States in Conference as the only means of extricating the Commonwealth from its grave financial crisis. It can hardly be doubted that judgment must have been given for the Commonwealth in the actions, had they been carried to an issue.[1] The question of enforcement would have been easy enough, for the constitutional amendment gave the Commonwealth the necessary legislative power to implement the agreement, apart from its general power to provide for the enforcement of decrees of the High Court, and, if necessary, a special tax could have been imposed on the State and levied by federal authority. The powers of the Court in these matters are of the widest, and the existence of this authority must have usefully contributed to the surrender of New South Wales. For the Commonwealth itself the financial crisis has brought substantial difficulties, for the majority of the opposition in the Senate necessarily felt bound to employ its strength to counteract the dangerous proposals of the government as to the fiduciary currency, the gold reserve and taxation, based on its majority in the Lower House, while the government lost the support of one of its ablest leaders in the shape of Mr. Lyons, who assumed on May 7 control of a united opposition in which Mr. Latham combined forces with him in order to secure the triumph of sound principles of finance. Thanks to this coalition of interests and the power of the Senate, a compromise was reached, under which, in lieu of confiscatory taxation, an appeal to patriotism was adopted with amazing success, in order to secure a reduction of some 22½ per cent. on the interest on the internal public debt of £556,000,000. It is natural that the attitude of the Senate should have been deeply resented, but it is clear that as an elective body the Senate has the full right to use its powers in the interests of the Commonwealth and that in the circumstances this use was wise. Incidentally, a curious controversy arose between the two Houses on the minor issue of the making of regulations regarding employment at the ports, for the government persisted in issuing identical regulations despite repeated disallowances by the Senate, and the Governor-General had to reply to a suggestion of the latter body that to go on signing regulations which it had disallowed was not quite constitutional. The Governor-General, however, was clearly within his rights in acting on ministerial advice. But the fact remains that it was unfortunate that he had not the authority to induce his ministers to desist from action which though legal was unquestionably unwise. The mediating influence which a Governor-General should exercise is inevitably diminished when he is the nominee of one political party and his appointment has been resented by the opposition.

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[1] Keith, *The Times*, July 8 and 10, 1931.

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[1] Keith, *Manchester Guardian*, April 20, 1931.

The Legality of the Appointment of the Governor-General.—An interesting conflict of view has been developed in the Commonwealth[1] regarding the legality of Sir Isaac Isaacs' appointment. Clearly there has been some discomfort on the issue in official circles, for it has proved decidedly slow work to obtain exact information as to the process involved. The actual facts, now revealed under strenuous pressure in the Commonwealth, are that the formal instrument of appointment was countersigned by the Prime Minister of the Commonwealth, but that it bore the signet which is in the custody of the Secretary of State and which was affixed on his responsibility. The fact is vital, for it appears to me fatal to Sir E. Mitchell's contention that the acts done by the Governor-General are all invalid and will have ultimately to be legally ratified. The use of the signet involves the Imperial government in responsibility for the appointment, and, if the situation is to be changed, it is clear that the Letters Patent creating the office of Governor-General should be altered to eliminate the use of the signet. But the whole question is capable of wider treatment. Sir E. Mitchell appears to contend that under the Constitution the appointment cannot be made one to be carried out on the advice of Commonwealth ministers as a matter of law, which means that the Letters Patent could not validly be altered to give the appointment to the King on the advice of the Prime Minister of the Commonwealth, for the King certainly cannot alter the rule of law. This seems to me to go too far; it is true that constitutionally action taken by the King in the United Kingdom should be on the advice of a British minister, but it does not appear to me that there is anything in the Constitution which would preclude the alteration of the Letters Patent to eliminate any such intervention. In the meantime the actual mode adopted, in which the Prime Minister of the Commonwealth, the Secretary of State and the King co-operated, may be regarded as an ingenious method of satisfying the law and gratifying the desire of the

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[1] For the papers issued by the Council of the Combined Empire Societies I am indebted to Mr. J. R. L. Brinkley.

Prime Minister. It must be added that the other Dominions, except the Free State, have shown no sign of approving the departure from practice. One inevitable result has been the agreement for the appointment of a High Commissioner to represent the Imperial government in the Commonwealth, since clearly the Governor-General has neither knowledge nor other qualifications for fulfilling, as did his predecessor, the double rôle of head of the local government and a sympathetic mediator between the Imperial and Commonwealth governments.

The Canadian Divorce Legislation.—While no possible exception could be taken on legal grounds to the decision of the Privy Council in *Attorney-General for Alberta* v. *Cook*,[1] which ruled that a wife's domicil must follow that of her husband, and that in no case, even if judicially separated, could a wife obtain domicil in a country distinct from that of her husband's domicil, it is not surprising that it caused annoyance in Canada, which, it must be remembered, is familiar with the lax rules of divorce jurisdiction in the United States. Hence the passage of the Divorce Jurisdiction Act, 1930, which adopts the doctrine that a wife deserted for two years or over may sue in the province where her husband was domiciled prior to the desertion for a decree of divorce. The extent of the legislation is thus limited to the case which is already recognized in Scottish and other laws [2] that a deserted wife will not be forced to seek the domicil of her husband, who may even have changed his domicil to that of some country which, like the Irish Free State, declines to give divorce. It is uncertain as yet whether such a divorce will be recognized by English courts, but in the case of Canada the matter is simplified by the rule laid down in *Armitage* v. *Attorney-General* [3] under which the validity of a divorce not in the court of the husband's domicil is recognized in England if it would be accorded validity by the courts of the husband's domicil.[4] If, therefore, a divorce is granted *e.g.* in Alberta and the husband is domiciled in Nova Scotia, the divorce will be held valid there under the authority of the Dominion Act, which is passed in virtue of an express power, and it will, therefore, be valid in England. But if the divorce is granted when the husband is domiciled in some other place than a part of Canada, the result may be different, for instance if he is domiciled in the Irish Free State. But no doubt for practical purposes the measure is innocuous and may afford necessary relief to injured parties. It was indeed proposed in the Bill to go further, and it is fortunate that this purpose was not carried out. In New Zealand the matter has been advanced a further step. Cases have arisen in which during the war period in special girls married men who never had been domiciled in the Dominion ; hence they do not come under the legislation of old standing in favour of wives of domiciled New Zealanders who are deserted by their husbands who then change their domicil. To meet the case, therefore, wives in this condition after three years' desertion, if they have lived all the time in New Zealand and intend to live permanently there, are given New Zealand domicil for the purpose of obtaining a divorce. It was fully recognized that such a divorce could not expect recognition in England, and that the husband thus divorced would there be deemed married and guilty of bigamy if he remarried. But the justice of affording relief to these unhappy wives prevailed on the legislature, though not without much hesitation. These cases suggest regret that the Indian and Colonial Divorce Jurisdiction Act, 1926,[1] was not made applicable to the Dominions at their request, for such cases might then have been dealt with as regards husbands of English or Scottish domicil—the most important cases—without risking unfairness to any party.

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[1] [1926] A.C. 444.

[2] Dicey and Keith, *Conflict of Laws* (ed. 4), pp. 295, 895, 896.

[3] [1906] P. 135.

[4] *Conflict of Laws*, p. 425.

Judicial Tenure in the Commonwealth.—One of the rare opportunities enjoyed by the Privy Council of deciding an Australian constitutional issue was afforded by the case *Shell Company of Australia Ltd.* v. *Federal Commissioner of Taxation.*[2] The issue arose by reason of the legislation of the Commonwealth as to income-tax, under which a Board of Appeal was originally constituted to which appeals might be taken from the Commissioners, and whose decisions were in certain cases final and conclusive. This Board was, however, given only a seven years' tenure of office, while the constitution requires tenure for life (s. 72). If, therefore, it was a judicial body, its composition rendered it invalid, and so it was duly held without doubt by the High Court in 1925. This led to legislation by the Commonwealth Parliament, creating in lieu a Board of Review which was given no power to issue conclusive judgments. The taxpayer was given the option to require reference of the assessment of the Commissioner either to the Board of Review, a business body, or to the Court, a judicial body. The issue then arose whether this mode of procedure was legal, or whether the Board of Review was not simply the old Board of Appeal under a disguise. On examination of the functions of the Board of Review the High Court and the Privy Council found it possible to discriminate the cases, and to hold that the Board of Review had merely executive functions similar to those of the Commissioner himself, and thus it was ruled that no actual question arose whether a judicial body could be constituted by federal legislation or executive order which was not accorded appointment for life. The Privy Council, however, in accord with the High Court, intimated its view that no such appointment could be made in view of s. 72 of the Act. The point illustrates one inconvenient lack of elasticity in the constitution, for it is not always desirable to entrust judicial functions only to persons with life appointments, though experience in Queensland has proved that judicial office should not be held on any temporary footing.

The Judiciary and the Executive.—A very interesting decision[3] has also been given by the Privy Council on the delicate issue of the power

[1] See *Conflict of Laws*, pp. 898, 899.

[2] [1931] A.C. 275.

[3] *Robinson* v. *State of South Australia*, 47 T.L.R. 454.

of the executive government to withhold documents from claimants against it on the plea that disclosure would be dangerous to the interests of the State and contrary to public policy. The question arose out of the commercial transactions of South Australia under the Wheat Harvest Acts of 1915 and 1916, and the issue was whether the State should be compelled to give discovery of the necessary documents to form the basis of the claim against it. The question was decided in the case of *Griffin* v. *The State of South Australia* [1] by a majority judgment of the High Court adversely to the claim for discovery, and the appeal came to the Privy Council virtually against that judgment, but formally against a judgment of the Supreme Court of South Australia refusing discovery on the strength of the High Court's ruling. The Privy Council proved most sympathetic to the claimant. It took exception to the idea that discovery should readily be denied; it stressed the commercial character of the issues involved, though expressly disclaiming any idea of denying that even in such matters privilege might be claimed. It pointed out the very imperfect and unconvincing form of the minister's claim of privilege, which did not take the form of a sworn or reasoned statement showing that he had actually applied his mind to the issues. It intimated that in an ordinary case it would have allowed the opportunity for a proper affidavit being put in on behalf of the minister, but in view of the delay which already had taken place, it decided in lieu to order inspection by the Supreme Court with a view to determine whether it could be against the public interest to give discovery of the documents, citing in favour a similar decision of the Supreme Court of Queensland [2] where a Commonwealth minister was concerned. The strong opinion was also expressed that in *Griffin's* case the plea of privilege should not have been accepted by the High Court. Something no doubt turned on the fact that the activities of the State had ceased, so restricting the possibility of injury through inspection, but the decision is a very emphatic assertion that the subject in litigation with the Crown is entitled to the utmost good faith.

The Indian Round Table Conference.—The outcome of the Conference marked a very great advance on the position of the Simon Report, for it accepted the doctrine of the introduction of responsible government in the central administration of India. But this agreement necessarily was accompanied by the demand by the British representatives for safeguards, and the crux of the problem is how to introduce any real responsibility together with safeguards. No doubt illusory safeguards are easy to provide, but the intention of the British representatives [3] has been clearly expressed that the safeguards must be real, and must include external relations, including relations with the Indian States;

[1] 36 C.L.R. 378.

[2] *Queensland Pine Co. Ltd.* v. *Commonwealth of Australia*, (1920) St. R. (Qd.) 121.

[3] Lord Peel, Parl. Paper, Cmd. 3778, pp. 448, 449; Lord Reading, p. 487; Sir H. Carr, pp. 466, 467; Mr. Gavin Jones, pp. 427–30.

defence; the maintenance of the tranquillity of the State in emergency; the observance of the constitutional rights of minorities; the fulfilment of obligations incurred under the authority of the Secretary of State for India; and the maintenance unimpaired of the financial stability and credit of India. In connexion with the last topic the device of a reserve bank has naturally been mooted which might manage the exchanges, while the service of Indian loans could be placed as at present as a primary charge on the revenues of India. But the whole difficulty is that of assuring to the Governor-General the effective power to carry out these functions without reducing responsibility at the centre to a nominal condition. Sir John Simon and his colleagues definitely ruled that the attempt could not be made, and there is little doubt that the very grave difficulties in the way of reconciling the safeguards and responsible government have been minimized, and that there has been insufficient recognition of the fact that Indian opinion expects the safeguards to be nominal. Hence the suggestions of the European minority community doing without formal safeguards, or the alternative idea, proposed by Sir Tej Bahadur Sapru[1] at the Conference, of giving that community protection by making all persons, being British subjects ordinarily carrying on business or residing in India, Indian citizens who as such would all be on the footing of equality. The proposal as it was presented was clearly inadmissible, seeing that it would apply even to Dominion nationals, and gave no option to British subjects to refuse such citizenship, as is done in the case of Dominion nationality legislation. But the suggestion was also open to the objection that, after all, the European community has a distinctive character of its own, in that its domicil is to be found in the United Kingdom, and the final agreement[2] reached was that "there should be no discrimination between the rights of the British mercantile community, firms and companies trading in India and the rights of Indian-born subjects, and that an appropriate convention, based on reciprocity, should be entered into for the purpose of regulating these rights." This agreement is of great importance, for it admits the true position of the European community and asserts in favour of India the doctrine of complete equality, thus accepting the doctrine that racial discrimination in the United Kingdom or in India is equally inadmissible, and that India's destiny is to attain full Dominion status.

The Position of the Princes.—The discussions in India have served to render clearer the motives which have actuated the Indian Princes in their attitude towards federation. The chief motive no doubt has been the consciousness of nationality, but it has been accompanied by the desire to secure for the States immunity from the current of movement towards democratic government which has so strongly marked the progress of events in India. It seems very naturally to the Princes that the autocratic form of rule of which they are possessed is best suited to their subjects, and is far cheaper than that in force in the British provinces, while the growth of the population of the States proves that the existence of that form of rule is no barrier to advance in prosperity. Under the federal system, they hold, they would have greater control than at present of those matters in which under the existing constitution they are subject to unregulated and uncontrollable pressure by the central government, and would also be able to take an important part in directing Indian policy in fiscal matters. At the same time, in non-federal subjects, including the constitution of the States, they would possess their full autonomy in internal affairs. They have received what they consider effective assurances that the leaders of the political parties in British India are perfectly willing to accept this position, and to dissociate themselves from any movements within the States demanding responsible government. The spokesmen of some at least of the people of the States have naturally protested against this arrangement to their detriment, claiming that their compatriots deserve as full a measure of freedom as those in British India,[1] but inevitably their protests have been passed by without redress. The position is difficult; the States demand from the Crown assurances of support in maintaining their sovereign rights, and the normal method under the old regime of remedying misrule by revolt and a change of prince is now impossible. On the other hand, whatever the present understanding, it will be difficult to maintain responsible government in the provinces side by side with autocratic if benevolent rule in the States, and there will be a risk of pressure on the Princes to concede reforms beyond those they deem wise.[2] It is not surprising in these circumstances if the Princes have lost some of their unanimity, and if there is likely to be a considerable number of States which wait to see the operation of federation before accepting it. One obvious consideration has to be borne in mind. Though issues of paramountcy, so far as they can still arise, are not to fall within the sphere of a ministry in the federation, there is no means by which the British Crown could be kept from acting in fact on the advice of the body which would *prima facie* have an almost overwhelming right to speak for the best interests of India as a whole. This point has influenced some supporters of federation to hope that the central government shall be constituted on such a basis that it will only in a general sense be responsible to the legislature.

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[1] Cmd. 3778, pp. 351, 352.

[2] Cmd. 3778, p. 353. Mr. Jinnah dissented.

The Hindu and Mahomedan Issue.—Most difficult of all is the question of securing the safeguards for the Mahomedans and Hindus respectively in the provinces where they are in a minority. The demand of the Hindu Nationalists for joint electorates with at most reservation of seats has failed in India to secure acceptance, for the Mahomedans naturally feel that in the long run this plan would prevent them being represented by the most convinced adherents of their views. No doubt separate electorates mean something like a negation of the possibility of the development of politics on non-racial lines, but the fact is apparent that the Mahomedans have not reached a stage in which they can feel secure without the protection which they demand even more insistently than was the case last year. Inevitably the clash of interests has aggravated sectarian strife and greatly augmented the difficulty of maintaining order in India, especially when that is already complicated by the concessions made by Lord Irwin to the demands of the Congress party in return for the participation of its spokesman, Mr. Gandhi, in the resumed discussions in London of the constitution.[1]

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[1] D. V. Gundappa, *The States and their People in the Indian Constitution* (1931).

[2] Dr. Shafa'at Ahmad Khan, Parl. Paper, Cmd. 3778, pp. 431, 432.

The Ceylon Constitution.—The difficulties of the Indian position are sufficiently shown by the events in Ceylon under the elections to the new legislature and the setting up of the Executive Committees. The idea that this ingenious plan of denying responsible government outright would have the desired results has failed to be realized. The voting was so managed that the ministry consists of five Sinhalese with an Indian Tamil and a Moslem member, to the exclusion of Europeans, while not one of the twenty-one Christians in the new legislature is placed on the Education Committee, which is entirely in the hands of Buddhists. It is indeed not very obvious that the system is superior to the ordinary form of responsible government; instead it seems likely merely to diminish the visible responsibility of ministers and to render it difficult to hold them responsible for the management of the vexed question of finance and of policy in general. What is noteworthy is the success of the polling of the enormous number of new voters, even in the case of women, a fact which naturally is insisted upon by those who demand that the franchise for the provinces in India should be far more rapidly expanded than higherto has been contemplated as desirable.

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[1] See the Report on the Cawnpore Riots, Cmd. 3891, which is instructive on the danger of a collapse of law and order when public belief in the power of the administration is undermined.

NOTES.

A Great International Jurist.—If consolation were possible for the many friends of the late André Weiss who mourn his recent death, it would be found in the memoir just given to the world by Professor Henri Capitant,[1] Weiss's pupil and life-long friend, his colleague in the Paris Faculty, and his successor in his *fauteuil* of the Institut de France. Perfect in proportion, restrained yet glowing in style, complete in knowledge, and full of intellectual and moral sympathy, it stands as a great example of that art of literary embalming which is practised with complete success by few save the countrymen of Corneille and Molière. To one who, though his personal acquaintance with Weiss was brief, had learnt, during that short acquaintance, to love as well as to respect him, Professor Capitant's memoir comes as a gift of rare value.

It is, perhaps, with some initial sense of surprise that the reader of M. Capitant's memoir finds, at the outset, that its author considers happiness to have been the most striking characteristic of his subject. For Weiss was born just twelve years before the war of 1870, and took part, as a mere child, in the battle of Wissembourg ; and he died in 1928, just ten years after the Great War, in which his beloved son was dangerously wounded, and which inflicted great suffering on himself, his family and his intimate friends, devoted citizens of the debated province of Alsace. Nevertheless, the record of brilliant literary success and social popularity which lay between these two tragedies, continuing in fact till Weiss's final illness, goes far to justify M. Capitant's judgment. At least one may hope that in this case the Fates were just ; for André Weiss undoubtedly deserved to be happy.

As is well known, Weiss's *chef d'œuvre* is his monumental work, *Traité théorique et pratique de Droit international privé*, first published in 1892 in four, and reissued in 1907 in six, volumes. Though not absolutely the earliest French authority on this essentially modern subject, for he was preceded by Pillet and he owed something to the Italian Mancini and to English and American treatises on the Conflict of Laws, Weiss's choice of title was significant of a change of attitude of great importance. For with him private international law is not merely a reproduction of the *droit positif* of different independent States, but, at least in prospect, a synthesis which, to borrow the language of the great Montesquieu, *se dérive de la nature de choses, i.e.*, in this case, the relations of States. In other words, his profound studies in Roman, French and other political systems, made during a long professorial career in which his duties had required him to expound to critical audiences many branches of the law, had convinced Weiss that, whatever the diversities of local systems (*lois*), there could, if civilization were to be true to its ideals, be but one law (*droit*) which regulated the actions of the family of States *inter se*, whether these actions dealt with public or with private interests. Though a profound student of public as well as of private international law, Weiss (a Protestant) held that the State was accessory to the individual, not the individual to the State, and that the assumption involved in the phrase " Conflict of Laws " is essentially anarchic. Whether he would have welcomed the very modern suggestion which proposes " International Private Law " as a substitute for " Private International Law," we have no means of knowing.

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[1] *Notice sur la vie et les travaux de M. André Weiss* (1858–1928). Par M. Henri Capitant, Membre de l'Académie, Paris (Firmin-Didot, 1931).

Although Weiss, unlike some of his distinguished colleagues in the Paris Faculty—*e.g.* Raymond Saleilles and Henri Lévy-Ullmann—did not specialize on English law, one of his achievements will be of special interest to English readers. For he, as M. Capitant informs us, was one of the first, if not the first, of French jurists to break down the barrier which had previously separated the School from the Palace, by including in his lectures and writings a careful study of judicial decisions. Till the middle of the nineteenth century, it had been almost a point of honour with the jurist to ignore, as irrelevant, the *arrêts* of the courts ; with the result that, as M. Capitant, himself a great *arrêtiste*, puts it : the law of the French jurist, " more logical perhaps, more in conformity with the spirit of the legislator . . . had the defect of being, on many points, not applied." The result of Weiss's innovation has not been, at any rate hitherto, to establish in France a doctrine of judicial precedent at all comparable with the severity of the English system. But, on the testimony of M. Capitant, it has been to infuse a reality into French law teaching and writing, which has substantially increased the influence of the French jurist.

From the turn of the century, Weiss's reputation began, inevitably, to draw him into affairs beyond the lecture-room and the study. He had been called from Dijon to Paris in 1891 ; in 1908 he became officially attached to the French Foreign Office, and in that capacity represented the Quai d'Orsay before various international tribunals, notably in the affair of the Casablanca deserters in 1909. The Ministry of Education and the Ministry of Finances sought his aid. In 1911, he was a member of a commission of three French jurists entrusted with the drafting of a Constitution for the Principality of Monaco. But the crown of his professional career was placed upon his head when, in the autumn of 1921, he appeared, with the Brazilian jurist Ruys Barbosa, at the summit of the united poll of Council and Assembly of the League of Nations for the election of the first judges of the newly founded Permanent Court of International Justice. Although the event involved the severance of many personal and professional ties—a severance which Weiss, the most affectionate of men, felt keenly—he could not fail to be gratified by this world-wide tribute to his character and achievements ; while the prospect of congenial, important and interesting work which it opened to him must have been at least some compensation for the partial severance from his friends in Paris and Alsace. It might naturally have been expected that the verdict of the League electors would be adopted by the Court itself in its choice of a first President ; but, perhaps because it was felt wise to confer that eminent position upon the representative of a country which had been neutral in the war and was, in fact, the seat of the Court, a distinguished Dutch jurist was chosen for the post. Weiss, however, served the office of Vice-President of the Court for three annual terms, and took a prominent part in the decision of at least one case of first-rate importance, *viz.* the *Lotus*, not, alas ! without some injury to his health.

Arduous as were his judicial labours, they did not absorb the whole of Weiss's energies after his transfer to The Hague. In addition to the valuable aid which he gave to the affairs of his co-religionists, and the local charities of his new residence, he had much to do with the founding, in 1924, of the International Academy of Comparative Law, of which, by acclamation, he was elected the first President, holding this office till the grave decline in his health showed itself in 1927. The writer of this notice had the privilege of hearing his inaugural address,[1] and of enjoying the hospitality of the President and his gracious and devoted wife, Madame Weiss. In his diary he finds it recorded that his duty call was returned within twenty-four hours by the President, despite the fact that the latter's judicial engagements were still claiming the bulk of his time. The incident was typical of the President's unfailing courtesy.

It is not, of course, for one who can assert no claim to special knowledge of the subjects which Weiss made peculiarly his own, to attempt an estimate of the latter's value to juristic science. But he rates highly the privilege of being allowed to record his humble tribute to the memory of an ardent patriot of the best type, who contributed solidly to the glory of his own nation without being unjust to other nations, who was a shining example of devotion to his family and friends, who was industry incarnate, and who yet found time to charm the wide circle of his acquaintances with his unfailing courtesy and readiness to help every good cause.

EDWARD JENKS.

Orthodox Law of Divorce.—It is a commonplace that even a slight acquaintance with Roman Law enables us to find numerous survivals of that mighty system in the bodies of law actually administered to-day. Portions of the Code Napoléon, indeed, are patently Roman ; Scots Law preserves many Roman doctrines ; less openly English Equity has borrowed Roman ideas ; Moslem Law, more obscurely but beyond reasonable doubt, owes much to Roman tradition. There is, however, no body of law actually in force which maintains so definitely its Roman character as that administered by the Courts of the Orthodox Church in Egypt, Palestine and Syria. The Codes of the Family Law and Law of Succession of the Orthodox Church in force till recently in the Courts of the Œcumenical Patriarchate at Constantinople and still, in theory at least, followed by the Patriarchal Courts in Jerusalem are little more than a summary of the later Roman Family Law with such modifications, particularly as to marriage, as Christian ideas made requisite. Presumably there is no other jurisdiction within which the legitimacy of children is still regulated by the provisions of Novel 18 and bears the time-honoured name of Falkidion with a reference to the Lex Falcidia (Code of Succession, Arts. 236 ff.). A Querella inofficiosi testamenti (ἡ ἀγωγὴ μέμψεως διαθήκης is still open in the Orthodox Courts Code of Succession, Arts. 290 ff.). Again there is surely no other existing system of law which asserts that the paterfamilias has both the ownership and the profits of the property coming from the paternal estate (*peculium profectitium*), that is of the money of which the father gave his child administration, and of the property coming from without (*aprosporistos pecaltium adventitium*)—that is such money as he acquires from the children otherwise than from the estate of the mother (*bona materna et materni generis*) or from the wife of the children or from any other estate which is not reckoned as military or quasi-military property (*castrense, quasi-castrense*).

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[1] Reprinted in *Actorum Academiae Universalis Jurisprudentiae Comparativae.* Tome I, ed. Balogh. (London : Sweet & Maxwell. Pp. 18–25.)

Of course, these legal survivals are rather a testimony to the conservative character of Canon Law than reflections of the actual social customs of the Orthodox community. But it is in Roman legal terminology that the Orthodox Law is still enshrined. And this is no less clear in connexion with Marriage and Divorce. Professor Corbett's recent valuable work on the Roman Law of Marriage gives us references to the provisions of the Code and Novels on the subject of divorce, and some of these after all these centuries still appear in the existing Orthodox Law. Of course, it is long since divorce by repudiation was permissible. Marriage is dissolved only by death of one of the spouses or by divorce decreed by a competent Ecclesiastical Court (Art. 246). But an examination of the grounds upon which divorce can be obtained brings constant reminders of later Roman legislation. A Constitution of Theodosius and Valentinian A.D. 449 (c. 5, 17–18) " sets out in detail," says Professor Corbett, " causes justifying divorce. Those common to both parties are adultery, treason, violation of sepulchres, church theft, harbouring of brigands, kidnapping and murderous designs against the other. Brigandage, cattle thieving, wife beating, intercourse with lewd women in the common home, on the part of the husband; staying out all night, attending games or theatres prohibited by her husband, on the part of the wife, complete the list." Justinian by Nov. 117 made certain changes. " Attempts or failure to reveal attempts on the life of a convert, attempt to cause a wife to consent to adultery, entertaining a mistress in the matrimonial domicile or even in the same city if the offence is repeated, dining or bathing with other men or staying away from home and attending shows without the husband's knowledge, these are the only crimes or wrongs, apart from adultery, henceforth justifying divorce."

Compare with this the Orthodox Code. Art. 248 tells us that (*inter alia*) if a wife contrary to the desire of the husband feasts or takes baths with other men or remains at night out of the conjugal home or unknown to her husband goes to see the horse races or the theatre, she may be divorced. So again a wife may claim a divorce from her husband (*inter alia*) if he plots against her chastity or accuses her of adultery and cannot prove it or commits adultery in the common home or continues to have intercourse with another woman in the same town and persists in this intercourse (Art. 249). And either party may claim a divorce if either spouse has conspired against the State or failed to denounce a treason or has plotted against the life of the other or is sentenced to a criminal penalty. So again, the taking of vows which justifies repudiation under Justinian's Novels is specified as a good foundation for a claim for a divorce by the Orthodox Code. And the period of one year which a widow or divorced woman was required to wait before remarriage according to the Imperial legislation, is still required under Art. 255 of the Orthodox Code.[1]

The above are but a few obvious examples. In truth one may say that the shade of the great Imperial legislators still hovers over Jerusalem.

F. M. G.

"Pacifism" and Naturalization in the United States.—The recent decision of the Supreme Court of the United States rejecting the petition of an applicant for naturalization on the ground that she was an avowed "pacifist" has hardly received on this side of the water the attention which it deserves.[2]

The judgments of that great court in cases into which considerations of public policy enter not infrequently reflect the opinions of the majority of the American people, and it may be that this is true here. If so, the post-war mentality of the United States would seem to differ widely from that of an earlier period.

The applicant was a Hungarian lady, about fifty years of age, who was a lecturer and writer and an accomplished linguist. She had resided in the United States for about ten years. She was prepared to take the oath of allegiance, but in the view of the majority of the Court the evidence as to her opinions made it clear that she ought not to be allowed to do so.

By the Naturalization Act of 1906 the applicant must take oath "that he will support and defend the Constitution and laws of the United States against all enemies foreign and domestic, and bear true faith and allegiance to the same."

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[1] Except in the three major communities, Moslem, Jewish and Orthodox, there are no regular religious courts, but when a case arises an *ad hoc* court of clergy is constituted.

[2] *U.S.* v. *Schwimmer*, 1929, 279 U.S. 644.

He must, in addition, satisfy the court that for five years preceding "he has behaved as a man of good moral character attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same."

The applicant in this case testified that "she would not take up arms personally." She explained that she kept an eye on publications in Hungarian, French, German, Dutch and Italian, and in the Scandinavian languages, and that she was prepared to defend American ideas with tongue and pen. She had no sympathy with any undemocratic form of government, "proletariat, fascist, white-terror or military dictatorships." But all this breadth of mind availed her nothing. A statement which she had made in a private letter was brought up against her. "I am an uncompromising pacifist. . . . I have no sense of nationalism, only a cosmic consciousness of belonging to the human family." The Court held on this evidence that her petition must be rejected. Naturalization was a privilege and the onus of showing he was worthy of it lay on the applicant.

The duty of citizens to defend the Government if necessary by force of arms was a fundamental principle of the Constitution.

The influence of conscientious objectors against the use of military force "is apt to be more detrimental than their mere refusal to bear arms."

Holmes J. gave a dissenting opinion in which Brandeis J. concurred. Their grounds of dissent were as follows:

1. The applicant being a woman, and over fifty years of age, would not be allowed to bear arms in any case.

2. She holds none of the now-dreaded creeds, thoroughly believes in organized government and prefers that of the United States to any other in the world.

3. It does not show lack of attachment to the Constitution that she thinks it can be improved and looks to the abolition of war.

4. "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into as well as to life within this country. And, recurring to the opinion that bars this applicant's way, I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant's belief and that I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount."

Comment is almost superfluous.

That the naturalization requirements are inadequate to prevent the admission to American citizenship of many eminently undesirable persons is common knowledge. A large number of the gangsters, racketeers and crooks of whose activities we hear so much are naturalized citizens. They have satisfied the authorities that they were sufficiently " attached to the Constitution " to merit the high privilege of American nationality.

No doubt people of this kind are not likely to boggle at the oath of allegiance nor shall we expect them to give themselves away in letters explaining their political sentiments. But that they should be admitted while persons like the applicant in this case have the door banged in their faces is a situation for an ironist.

F. P. W.

Is Democracy a Failure?—The *Annuaire* of the *Institut International de Droit Public* for 1930 which is reviewed in this number contains three essays on this question and also the report of a discussion by the Institute.

And it is not without significance that there has been in the last year or two a remarkable output of books devoted to this matter, several of which were recently considered together in a leading article of the *Times Literary Supplement.*[1]

And Mr. Winston Churchill chose as the subject of his Rectorial address at Edinburgh University " The Present Decline of Parliamentary Government in Great Britain."[2] Mr. Churchill there said of the House of Commons, " It has steadily declined in public repute and shows itself increasingly inadequate to deal with the real topics of public interest." It seems to be generally agreed in Europe at any rate that parliamentary government has lost much of its prestige and there is a widespread feeling that parliaments are showing themselves unable to cope satisfactorily with the manifold difficulties of these distracted times. What people are asking is not whether the world is safe for democracy but whether democracy is safe for the world.

M. Joseph Barthélemy says, " *Il y a une crise dans les idées, dans les esprits, et, si je puis ajouter, dans les cœurs. Nos pères ont fait des révolutions pour avoir la démocratie représentative, on en est à se demander aujourd'hui qui verserait son sang pour conserver des Chambres, des députés, des sénateurs. La foi s'en va ; elle est morte.*"[3]

He points out that within the last century the republican form of government has spread widely and that whereas in 1820 there were only three republics in the world, Switzerland, the United States and Haiti, there are now at least forty, of which fourteen are in Europe. It is true that in modern times, and especially since the war, " sceptres and crowns have tumbled down " as never before. But the most alarming fact is not the substitution of the republican for a monarchical form, but the rise of dictators in some countries and the growing malaise in others.

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[1] February 26, 1931. The books there reviewed are Battaglia, O. F., *Dictatorship on its Trial* ; Günther, R., *Diktatur oder Untergang* ; Mowrer, E. A., *Sinon, or the Future of Politics* ; Pink, A., *A Realist looks at Democracy*, and Frankfurter, F., *The Public and its Government.* More recently has appeared the work of Lord Eustace Percy, *Democracy on Trial.*

[2] *Times*, Friday, March 6, 1931.

[3] *Annuaire*, p. 45.

According to Dr. Günther of Vienna, the title of whose book speaks for itself, dictators are the only hope for Europe because only by them can Europe be made sufficiently united to hold its head up against America, and he says in a delightful sentence, which as the writer in *The Times* says defies translation, "*Wir doch um Gotteswillen nicht auch noch kulturell americanisiert werden wollen.*"

M. Barthélemy is by no means of this opinion. He gives one of the best and fairest accounts of fascism which we have come across and is not at all blind to the great services which that remarkable system has rendered to Italy nor to the fire of enthusiasm which inspires many of its adherents. But he thinks that experience proves that governments which depend upon violence are never long-lived and that in spite of all disillusionments the only hope is in democracy. "*La leçon des faits c'est que le suffrage universel est la grande force statique, conservatrice de l'âge moderne.*"[1]

And he concludes his valuable essay with these striking words: "*Mais je dis que plus un peuple est civilisé, plus il éprouve le besoin de se gouverner lui-même et plus aussi il a droit à se gouverner lui-même. Je dis aussi que le devoir des gouvernants est de conduire les peuples vers leur majorité. Et je conclus enfin que la liberté démocratique est le régime des peuples majeurs.*"[2] Nor has either President Lowell or M. Vauthier any faith in dictatorship as a remedy.

Mr. Lowell[3] points out that criticism of parliamentary government is no new thing, and that some of the remedies proposed are worse than the disease. Among the inherent defects of the system he enumerates (1) the tendency of a member of Parliament to look to the interests of his constituents as opposed to those of the nation, a defect which it may be said, in parenthesis, is much more serious in the United States than in England; (2) the want of a sufficient sense of personal responsibility on the part of members; and (3) the excess or the insufficiency of the autocratic element. Where there is an excess, as in some of the less advanced countries of South America, the President is virtually a dictator and the State becomes a despotism tempered by revolution. In other countries he says the autocratic element is too weak, so that it is not possible to have a strong government. But Mr. Lowell finds that in England the Cabinet possesses in fact a greater degree of autocracy than is perhaps found in any other democracy, and he thinks that the American Constitution, like the American locomotive engine, is less elegant than some others but is better fitted to stand shocks and jolts. M. Vauthier assures us that there is no fear of fascism in Belgium. He admits the charm of its exaltation of the fatherland which it invests with a sort of supernatural beauty, but he thinks the price is too high. "*Le fascisme implique la répudiation de cette 'liberté de manifester ses opinions' que le peuple Belge considère comme l'un des titres de gloire de la Constitution du 7 février* 1831."[4]

[1] P. 163. [2] P. 164. [3] P. 169. [4] P. 199.

Serious as our difficulties are, we imagine that few people in England are disposed to surrender their liberties. We should, most of us, accept the dictum of General Smuts, " The consent of the governed is the only secure and lasting basis of government, and liberty is the condition of consent. No enduring system can be established on the negation of liberty, even if it comes with the temporary gift of good government."[1] What, then, is the remedy ? It must lie in devolution by Parliament of some of its powers. Mr. Churchill advocates an economic sub-parliament and the creation of local governments with something like the powers of American States. Lord Eustace Percy would like to have a Ministry of Economic Development.[2]

Professor Frankfurter thinks that governments might make more use than they do of the experts. Like some other American observers, he is greatly struck by the excellence of our Civil Service, and it is a fact that we are drifting almost insensibly towards legislation by ministerial departments in a good many fields. Mr. Carr has pointed out that the Statutory Rules and Orders for the year now greatly exceed in bulk the Statute Book.[3]

We have lately been taught to distrust bureaucrats and have heard much of the new despotism, but can we not tame our tyrants ? Why should it not be the rule instead of the exception that when Parliament had agreed to the principle of a Bill the task of working out the details might be left to the experts ? It ought not to pass the wit of man to devise guarantees sufficient to protect the subject against abuses. But this protection will not be secured merely by allowing some method of appeal to the ordinary courts so long as litigation is the privilege of the rich or the reckless. There must be some machinery for hearing and deciding complaints which is at once speedy and inexpensive.

F. P. W.

Istituto di studi legislativi.—In an earlier number of this *Journal*[4] some account was given of the foundation and objects of the Istituto di studi legislativi, together with a summary of the contents of vols. i–iii of the Institute's *Annuario*. The ample volumes now before us[5] mark the progress made during the past year ; they bear witness to an ever-widening range of accomplishment, and to the indefatigable industry of the editor, Professor Salvatore Galgano. Volumes IV and V (in one) consist of three separate parts, devoted severally to *Dottrina*, *Legislazione* and *Giurisprudenza*. With Volume VI begins a redistribution of the subject-matter. In future, Professor Salvatore tells us, each volume will contain two parts, the first dealing with Doctrine and Jurisprudence, the second with Legislation. The first part will be issued in separate *fascicules* at intervals of about four months.

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[1] *Africa and Some World Problems*, pp. 175, 176.

[2] *Democracy on Trial* (Lane).

[3] *Delegated Legislation* (1921), p. 1.

[4] Third Series, vol. xii, pt. i, p. 115.

[5] *Annuario di diritto comparato e di studi legislativi, volumi* iv. e v., *Parti* I, II, III, *volume* vi, *Parte* I (*Fascicolo* I) ; *Edizione dell' Istituto di studi legislativi*, Roma, 1930.

The volumes before us cover a wide range in regard both of matter and of territorial extension. Under the head of " Doctrine " (Vols. IV and V, Part I) is found, besides other contributions of general interest, a series of sixteen articles on the draft Franco-Italian Code of Obligations. Three of these are by English writers. Other features which deserve special mention are a treatise on the Soviet Labour Law by Professor E. N. Danilova, and an account of the course of legislation in the United States of America from 1919 to 1928 by Professor James M. Landis of Harvard. There is, besides, a careful summary of the output of legal literature in many European countries and in the United States.

Part II contains a full summary (with annotations) of legislation for the years 1927–28. It comprises twenty European countries, the United States of America and Japan. In many cases *projets de loi* are included.

Part III summarizes (with critical comment), under general heads, the decisions of the superior courts of the principal countries of Europe. The English section, which is confined to cases falling under the captions " Conflict of Laws " and " Law of Contracts and Torts, " is contributed by Professor Winfield. A special section is devoted to the decisions of the Mixed Arbitral Tribunals (Italian-German, Italian-Austrian, Italian-Bulgarian).

In Vol. VI, Part I, as already noted, Doctrine and Jurisprudence are brought into closer relation. The greater part of the first *fascicule* is devoted to a series of articles on the Draft Italian Penal Code. These valuable studies, seventeen in number, are printed also in a separate volume, published under the title *Il progetto Rocco nel pensiero giuridico contemporaneo*. We notice amongst them a treatise by Dr. W. T. S. Stallybrass, which it is a pleasure to learn will be made more accessible to English readers in the pages of this *Journal*.

Considerations of space render impossible a more detailed review of the rich material contained in these volumes. That the comparative study of the laws of different countries should be pursued, as it is to-day in Italy (and not in Italy alone), with precision of scientific method, and with no less than passionate enthusiasm, is a remarkable phenomenon of contemporary juristic thought. Are we witnessing the early stages in a movement which will culminate in a reciprocal reception of foreign laws world-wide in its operation ? The idea that the laws of the world can and should be reduced to one system, which seems to inspire many continental jurists, will, perhaps, make little appeal to the phlegmatic English mind, except so far as its realization may be thought to subserve some practical convenience. But legal science must take the whole of law for its province, and comparative studies are, at all events, a valuable corrective of the limited outlook produced by a too narrow discipline. " Home-keeping youth have ever homely wits." The time is overdue for a recognition of comparative law in the curricula of our own universities and schools of law.

R. W. L.

International Congress on Criminal Law.—The third International Congress on this subject is to be held at Palermo on April 4, 1932. It is probable that there will be no official participation in the congress by our Government, but it is to be hoped that some distinguished English lawyers will attend the congress. The questions to be discussed are extremely interesting. They may be summarized as follows:

(1) Are there certain crimes of so grave a character and, as the *Ordre du Jour* puts it, "*blessant l'humanité tout entière*" so seriously, that in regard to them the ordinary rules of jurisdiction ought not to apply? It is suggested that the court of the place where the offender was arrested might have jurisdiction whatever the nationality of the accused and wherever the crime was committed. If this principle is admitted, to what crimes should it apply?

(2) Defamation and the *jury d'honneur*.—There are certain offences for which the ordinary criminal law does not seem to be well suited. This is particularly the case with attacks on reputation. Might it not be advisable to withdraw cases of this kind from the ordinary courts and to submit them to a jury of honour? Or, while not taking away the competence of the ordinary courts, there might be in these cases a special jury composed of men of honour to appreciate the injury to reputation.

(3) Is it desirable to have, as well as a Penal Code and a Code of Penal Procedure, a Code of the Execution of Penalties? At present the manner in which sentences are to be carried out is determined by administrative regulations, and some critics contend that this leaves too much room for arbitrary conduct on the part of officials.

(4) In criminal matters is it better to have a jury or a court of local magistrates (*échevins*)? If we decide in favour of the jury, should it have a voice in determining the punishment?

(5) Should the accused be allowed to give evidence on his own behalf?

(6) Is it desirable to have special judges for criminal cases? We all know that continental penal law and penal procedure differ widely from our criminal law, but the experience of English lawyers might be very helpful in regard to some of these questions.

Bibliography of English Property Law.—The Bibliography of English Property Law which appeared in the February Number of this Journal was compiled under the auspices of the Society of Public Teachers of Law. The suggestion for the Bibliography was first mooted by Professor Hazeltine, and the scheme was drawn up by a small sub-committee of the Society consisting of Professor R. A. Eastwood, Professor D. Hughes-Parry and Mr. E. C. S. Wade. For the actual work of compilation, the Society is indebted to an Editorial Committee, on which the following served—

Professor R. A. Eastwood, Mr. B. B. Benas, Mr. R. Y. Hedges and Dr. H. Potter.

The Middle Temple.—In 1912 the late Dr. Blake Odgers revived the ancient custom of Reading in the Middle Temple which had been discontinued since 1680. It was not continued, however, until Mr. Justice McCardie again returned to the ancient practice in 1927. The latest contribution to the series has been made by Sir Lynden Macassey and published under the title *The Middle Temple's Contribution to the National Life.* Although the four Inns of Court are equal in status, it must be admitted that the members of the Middle Temple can provide a wider range of contribution in all departments of life than the other three. From the Elizabethan age when Middle Templars were foremost among those who laid the foundations of the British Empire there has been a constant stream of members of the Inn notable in their respective avocations—sailors, soldiers, men of letters and statesmen—besides a number of lawyers not less eminent than those from the other Inns. In addition the Middle Temple can claim to have made at least one contribution of international importance. The association with the United States, established at its foundation by men who had been trained in the Middle Temple, has been revived in recent years by the election of distinguished statesmen and lawyers as Benchers, following the precedents of the seventeenth century when famous Ambassadors of the Venetian Republic were elected as honorary members. It is not only Middle Templars who will be grateful to the learned author for a fascinating little account of famous men and their contribution to Britain's greatness.

Check on Sale of Lands in the Federated Malay States.—A Bill recently introduced into the Federated Malay States Federal Council aims at providing a temporary check on the sale for debt of lands held by smallholders. At the present time of economic depression there is a real danger of a wave of foreclosure which might in its effect occasion a serious disturbance in the land settlement of the country. It is therefore considered desirable that such sales should be subjected to examination and consideration from a point of view which it is not competent for a collector or the Court to entertain.

Malayan Legislation on Dentistry.—There being no existing law in the Federated Malay States regulating the profession and practice of dentistry, a Bill has recently been introduced into the Federal Council to remedy the defect. Provision is made for the creation of a Dental Board, which will be required to keep a register of qualified dentists, will exercise powers of discipline over those registered and will provide for the inspection of premises used for the practice of dentistry. Exemption is made for practitioners of Asiatic dental systems who practise tooth-extraction only, and provision is made for the existence of dental companies.

NOTICES OF BOOKS.

THE CANADIAN CONSTITUTION.

PROFESSOR W. P. M. KENNEDY'S energy has restored to us the long-lost text of the report made by the Governor of Quebec and the Chief Justice in September 1769 on the legal system of Quebec.[1] The substance of their views has indeed long been known. For Masères's criticisms and the proceedings in Parliament on the passage of the Quebec Act brought out clearly the standpoint of the protagonists in the discussions which revolved round the issue of the system of law to be applied to the new colony. The best statement of the issue is that given by the Chief Justice, and it is much to be regretted that Carleton in the long run succeeded in preventing the assimilation of Quebec to the English system of commercial law. The value of the new material is enhanced by the inclusion in the publication of Masères's draft and his criticisms, though these have already appeared elsewhere. Some light is shed on the activities of the mysterious Mr. Morgann, who was sent by the British government to report on the issue, between August 1768 when he landed at Quebec and January 1770 when he returned to England. His output of work appears to have been decidedly meagre owing to the imperfections of health and temper, and fondness for procrastination (p. 47), which he admits, as well as his inability to understand French—a curious qualification for his task; but we apparently have in Carleton's report the substance of his lucubrations on the legal system. His work on the Church and the revenues seems to be finally lost, but probably no great regret need be felt on that score. A full index and careful notes add to the completeness and value of the publication.

To Professor Kennedy again and Mr. D. C. Wells, of Osgoode Hall, Toronto, we owe an interesting discussion of the law affecting the power to tax in Canada,[2] which will serve excellently all those who desire to obtain a sound grounding on the fundamental issues of a difficult question. Parliamentary taxation of the North American colonies was of course renounced in 1778, a renunciation which was later completed by the disuse of the power of disallowance of colonial taxation measures, so that the issue is reduced frankly to one of federal and provincial power. Moreover, in accordance with the Imperial precedent, the power of disallowance has in fact been abandoned by the federal government in any matter of taxation, and in other issues most narrowly restricted, as is shown in Chapter IV, perhaps rather irrelevantly but in an interesting manner. The Dominion power of taxation (ch. iii) raises few problems. But the question of extraterritorial legislation arises and is considered with special reference to the decision in *London and South American Investment Trust* v. *British Tobacco Co.* (*Australia*).[1] The point is important, for the issue there was whether an Australian Act could justify the deduction of Australian taxation from the dividends on shares in an English company held in England. If this limitation is removed under the Statute of Westminster, what will be the effect of the Australian or similar Canadian legislation? The answer is wholly conjectural; clearly even with the limitation removed, the presumption is that any legislation is not intended to have extraterritorial effect; if, however, the intention to have such effect is clear, the issue still arises whether English courts can be bound by it. They cannot, of course, be bound by any foreign extraterritorial legislation, but the effect of giving power by Imperial Act may be different. It is, in fact, a point which ought to have been fully defined in the legislation proposed as desired by the Imperial Conference of 1926 and not left to the courts to interpret. Another issue (pp. 150–5) is the problem whether there exists under the constitution a power to impose indirect taxation for provincial purposes. It is contended that such a power must lie somewhere, but this is hardly sufficiently supported by Lord Loreburn's declaration[2] that "it would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada." This is doubtless broadly true, but the matter cannot be carried further than that. For instance, there is withheld from Canada the obvious and essential power of altering the constitution which every representative government colony was assured, and the office of Lieutenant-Governor cannot be dealt with by either federal or provincial legislation. We must, therefore, look merely at the Act, and we find that the grant to the federation (s. 91) is one of legislation for Canada, not for the provinces, and the provinces are given definite power to legislate for direct taxation for provincial purposes. It seems clear, therefore, that indirect taxation for provincial purposes was definitely ruled out, nor is there any authority beyond some *dicta* in favour of the existence of such a power, while against it there is far more substantial weight of authority. At any rate, the Privy Council being the final authority at present, it is practically certain that no such view would appeal to that body. Nor does it appear likely that that body would accept the further suggestion (pp. 147–50) that a province might impose a licence fee which would be valid under s. 92 (9) of the British North

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[1] *Reports on the Laws of Quebec*, 1767–1770. Edited by W. P. M. Kennedy and Gustave Lanctot. (Ottawa: King's Printer, 1931. Pp. 92 (English version) + 95 (French version).)

[2] *The Law of the Taxing Power in Canada.* (University of Toronto Press, 1931.) Pp. xvi + 157.

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[1] [1927] 1 Ch. 107.

[2] *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1912] A.C. 571, 581.

America Act, but would be indirect taxation, and not therefore within s. 92 (2), though the contingency is not likely to arise.

Provincial taxation raises the very difficult question as to the meaning of " direct taxation within the province," and it would hardly be true to say that the jurisprudence on the subject is particularly satisfactory. In effect the Privy Council seems to take the state of law in England in 1867 as the guiding principle, and on the basis of that state of affairs it decides what is " direct " taxation and what is " taxation within the province." In the authors' discussion (pp. 47–65) perhaps greater importance is laid on the necessity of applying Mill's famous definition of direct taxation than is now justified on the reasoning of the Privy Council in *City of Halifax* v. *Fairbank's Estate*[1] on which I have commented at some length. Far more difficult is the situs of property, of which an excellent summary is given, according in substance with that adopted in English textbooks on the Conflict of Laws. One point may cause misunderstanding; the citation from Lord Abinger (p. 97) in *Attorney-General* v. *Bouwens*[2] might suggest that a negotiable instrument in the form of a bill of exchange or promissory note is not taxable in England if the debtor is not there resident, which, of course, is not the case. What, however, is much more important is the issue whether it is satisfactory to accept even in an attenuated form the doctrine that a succession under the maxim *mobilia ossibus inhaerent* has a situs of a local kind. Under the pressure of judicial *dicta* this conception appears to have influenced the authors in their formulation of the rules of taxation (p. 131), where it is laid down of tangible moveables that " this type of moveable, like the immoveable, can be taxed in the province where it is in fact situate for all purposes, save that of a tax on the distributable surplus of a decedent's estate." But a distributable surplus is clearly not a tangible moveable, and the exception is not *in pari materia* to the rule. The same principle is laid down as regards intangible moveables, but here again the nature of intangible moveables in the ordinary sense and a distributable surplus are very different. A bank deposit is a very different thing as regards situs from a distributable surplus; for instance, the former can be recovered by a suit, the latter cannot thus be recovered unless and until it is actually in the hands of an administrator in the jurisdiction, which is rarely the case. Abandon the idea of a situs of the distributable surplus, and the rule becomes simple and elegant. A province can tax every moveable and immoveable within the province (excepting Dominion property as such). This is taxation which can conveniently be called *in rem*, and, on the other hand, the provinces cannot tax in this way property not within the province, as declared in *Woodruff* v. *A. G. for Ontario*,[3] which is clearly good law.

On the other hand, we have taxation *ratione personae*, which rests on the fact that a province has full power to tax any person therein domiciled or resident. Nor is there any provision of the constitution which determines the basis of such taxation. When, therefore, any person within the authority of the province thus acquires an inheritance, there is no legal principle to forbid his being required to pay a tax, which usage and justice suggest should be based on the net value of the heritage which, of course, may and often does consist of moveables and immoveables situate outside the province in which he resides. We need have no concern with the situs of the distributable surplus; it is not it that is the object of taxation but the person taxed, and that this is the case is seen at once when we remember that it cannot make any difference whether the beneficiary receives the surplus through the will of one domiciled within or one domiciled without the province. But the taxation must be imposed on the beneficiary, and, if on an executor or other person, it must be as a piece of machinery imposing on such a person no personal obligation,[1] but merely using him as a holder of funds of the beneficiary.

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[1] [1928] A.C. 117; *Journal of Comparative Legislation*, Third Series, vol. x, pt. i, pp. 104, 105.

[2] (1838) 4 M. & W., 171, 191.

[3] [1908] A.C. 508.

This point of view certainly does not accord with *dicta* in some of the Canadian cases, but it is in harmony with everything decided by the Privy Council, and in Canada judicial opinion has been too discordant and inconsistent to afford any clear basis for a theory. No doubt as Anglin J. has stressed,[2] there is room under this system for double taxation, but that is inevitable. The only further point of importance is the fact that the decision in *Lambe* v. *Manuel*[3] warns us that the legislature must make it clear what kind of tax it is imposing, though, when it is plain what is meant, the name of the Act will not affect the issue. It must be added that at p. 121 the decision of the Privy Council in *Brassard* v. *Smith*[4] is incorrectly stated; it held that the situs of the shares in question was Nova Scotia, not Quebec (see pp. 102, 103), one of the few slips in what will prove a very useful book.

The existence of two federations in the Empire gives special interest to Dr. Harold W. Stoke's study of the foreign relations of federal states,[5] though naturally his chief concern is with the issues affecting the position of the United States. The existence of federal and local authorities is of importance as regards foreign relations only where federalism is genuine; Mexico, Argentina, Brazil and Venezuela through the centralism of their systems have not experienced serious difficulties on this score. The United States derives some embarrassment from the weakness of the central authority to secure full protection for the nationals of foreign states within its limits; Dr. Stoke with most American jurists fully recognizes and regrets (pp. 140–50) this defect in the working of the system; it is probably not inherent in the Constitution, for it seems likely that Congress could legislate to give the necessary powers to the federal government, and it clearly is unsatisfactory that that government should be able to meet complaints by foreign Powers with the assertion of lack of ability to control the State governments. In Canada the issue of chief importance at present is the measure of control over provincial legislation which the federation might secure by acceptance of treaties on issues concerning the provinces. The question is one of which the difficulties are patent,[1] and it is obvious that it is very convenient for the federal government to be able to reply to requests for the ratification of the eight hours a day labour convention by the assertion that it is a matter for the provinces, which are unwilling to curtail the inherent right of man to improve his position by working such hours as he thinks fit. In point of fact it would obviously be a serious breach of the spirit of the constitution thus to invade local powers, for, when the constitution was framed, any idea of such high-handed intervention could not have been entertained. It is clear that the federal government in the United States could not effectively enlarge the authority of Congress in any matter of consequence, such as child labour, by accepting a treaty, despite the high position as authorities on law according to treaties by the Constitution. On the whole, however, one may agree with the author's conclusion that the federal system is not at present a serious drawback in international relations, partly no doubt because of the readiness shown by other states to respect the difficulties created for governments by the essential character of federalism.

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[1] *Cotton* v. *The King*, [1914] A.C. 176; *Alleyn* v. *Barthe*, [1922] 1 A.C. 215.

[2] *The King* v. *Cotton*, 45 S.C.R. 469, 538.

[3] [1903] A.C. 68.

[4] [1925] A.C. 371.

[5] *The Foreign Relations of the Federal State.* (London: Mr. Humphrey Milford, Oxford University Press.) Pp. vii + 245. Price 10*s*. 6*d*.

A. Berriedale Keith.

A LEGAL CLASSIC.

So much has been said and written in praise of Sir Henry Maine's *Ancient Law*,[2] that there would appear to be little left for a reviewer to write when a new edition appears. As is well known, after the death of its famous author, the task of supplying the comment necessary for keeping the readers of his work abreast of contemporary knowledge was entrusted to an equally famous editor, Sir Frederick Pollock; and this is the ninth issue of the book under his supervision. Inasmuch as at least ten editions of the work were published in Sir Henry Maine's lifetime, it is clear that it has taken its place in the small and select list of books which most persons with any pretensions to culture, at any rate in its author's own country, deem it necessary to read. And it is additionally gratifying to discover that continental jurists, who, not so long ago, were inclined to assume that English contributions to the theory of law were negligible, are now making large exceptions from this view, of which *Ancient Law* is a conspicuous example.

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[1] See Keith, *Journal of Comparative Legislation*, Third Series, vol. xiii, pt. i, pp. 123, 124.

[2] *Ancient Law*. By Sir Henry Sumner Maine, with Introduction and Notes by the Rt. Hon. Sir Frederick Pollock, Bart., LL.D., D.C.L. New Edition. (London: John Murray, 1930.) Pp. xxiv + 440. Price 10*s*. 6*d*. net.

The learned editor of the present issue, at the end of his Introduction, indicates that he has found it necessary to recast his former Notes on the Patriarchal Theory and on Archaic Procedure, but that otherwise few changes have been made in his contribution to the work. This appears, as before, not in the embarrassing and clumsy form of footnotes, but as Appendixes to the various chapters. Of these admirable brief treatises it is difficult to speak too highly, or to suggest any criticism, except that they might with advantage in some cases be enlarged. For example, a reference to the experiments in marriage-law of the Soviet Republic (which have recently figured in an English law court) might further illuminate Note L; and we should welcome, under Chapter VIII of Maine's treatise, a pronouncement on the true relation, in the evolution of legal systems, of possession and ownership, or, as it is less exactly called, "property." The popular theory, to which Maine seemed to lend some countenance, that property is possession ripened by prescription, has always seemed to us to be inconsistent with the fact that, at least in some conspicuous instances, possession does not appear as a legally recognized institution until long after ownership has been recognized—in fact it assumes ownership as a basis. Is it not the truer view, that the old undifferentiated relationship between a human being and a material substance which survives in the wide range of the possessive pronoun was in course of time dissolved by unconscious analysis into various separable elements, but that the "residual right" is that which most closely reproduces the original conception?

EDWARD JENKS.

BUREAUCRACY TRIUMPHANT.[1]

MR. C. K. ALLEN, lately Professor of Jurisprudence at Oxford, has reprinted in a pleasant little book three articles published in the *Quarterly Review* in 1923, 1925 and 1930, with a paper read at Cambridge in 1928 before the Society of Public Teachers of Law. Their common topic is the encroachment of government departments upon our ancient liberties. He makes good his claim that the cases which he cites "seem to show, first, that the principle of the Rule of Law needs candid and careful revision, and second, that the temper of the present bureaucracy is to press unmeritorious claims to the profit of the Crown and the unjust detriment of the subject." Mr. Allen was early in this field, and there is cumulative value in a collection of his views expressed over several years. His criticisms are fair; he is aware of arguments on the other side; indeed his treatment of an opponent is a pattern of polite and learned controversy. His attack on the proposal (in clause 4 of the

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[1] *Bureaucracy Triumphant*, by Carleton Kemp Allen, M.C., M.A., lately Professor of Jurisprudence and Fellow of University College, Oxford (London: Mr. Humphrey Milford, Oxford University Press, 1931). Pp. 148. Price 5*s*. net.

Rating and Valuation Bill of 1928[1]) for administrative consultation of the judiciary drew a reply from Mr. E. C. S. Wade; replication, rejoinder and surrejoinder followed, and they make an interesting appendix to Mr. Allen's book.

It is the legislative phenomena of departmental activities which will most directly interest a reader of this Journal. They are not novel. The germ, for instance, of the practice of altering a statute by an order is to be detected in 11 Ric. ii, c. 11. And Sir Arthur Quekett has lately reminded us of a precedent for the formula "shall have effect as if enacted in this Act" in a document (printed by Stubbs) as old as the year 1385. Mr. Allen recognizes that some delegation of legislative power is inevitable; constructive criticism must define the limits. How, he pertinently asks, did Parliament contrive to perform its legislative functions sixty years ago without the masses of Statutory Rules and Orders which now accumulate every year? The accumulation is undeniable, though the annual total is now steady almost at the pre-war mark. But there was plenty of delegated legislation even in the seventies, only it was not yet labelled Statutory Rules and Orders, nor (for want of a Rules Publication Act) was knowledge of it readily accessible. Parliament, of course, had not then instituted State insurance nor elaborated other social services such as education, factory welfare or housing. The complexity of modern legislation—income-tax law, for instance—undoubtedly gives our administrators an advantage over the ordinary citizen. It is a pity that there are "no votes" in a programme of simplifying, consolidating and improving the form of the statute law.

Mr. Allen's title, stirring us to awake and defend ourselves, half hints that the chiefs and underlings of government departments consciously desire to enslave us, and that our present discontents are the fruits of their victory. For the increase and complication of our laws politicians, as well as administrators, must be scolded. Bureaucrat, voices in Whitehall may murmur, is one of the bad names given to the dog before hanging him. Is it the dog that promises the electorate the millennium? Is it the dog's belief that the remedy for all ills is more Acts of Parliament? Is it the dog's fault that the Crown Proceedings Bill has been delayed? Was it to please the dog that the recent Unemployment Insurance (No. 3) Act handed over "anomalies" to be dealt with by delegated rather than by direct legislation? The dog, we know, had his day during the war period. Then the public tolerated him; the law officers positively patted his head; and a distinguished judge, ordinarily no dog-lover, observed that war cannot be carried on according to the principles of Magna Carta. When hostilities ended and D.O.R.A. still lingered on, the dog was rightly kicked. Yet in 1920 Parliament passed the Emergency Powers Act, and the post-war inability to buy chocolates in theatres, typical to the popular mind of the dog in the manger, was the considered and direct decision of the Legislature in 1920 and 1921. Let us be kind to dumb animals. The dog is not as innocent as Gelert, but his executioners must not hang him merely because they object to a policy of State interference or to oppressive taxation which the dog does not dictate. Political parties alternately encourage and condemn recourse to bureaucratic methods. If a National Economy Bill seeks to authorize the lavish use of Orders in Council, the volume of protest depends upon the estimate of the necessity.

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[1] For a summary of the clause see *Journal of Comparative Legislation*, 3rd Series, XII, pt. ii, pp. 10–11.

Administrative usurpations of legislative and judicial functions have been reviewed for a year or more by the Lord Chancellor's Committee on Departmental Powers, presided over at first by the Earl of Donoughmore and afterwards by Sir Leslie Scott. It is a strong and fully representative Committee, well equipped at all points ; its members will have studied Mr. Allen's writings as a foundation for their deliberations. All who are interested in the principles and technique of our modern administration will turn eagerly to the Committee's report.

C. T. C.

LOCAL GOVERNMENT IN ENGLAND.[1]

WELL-KNOWN writers have already described past epochs in English local government. Mr. W. A. Robson's new book deals rather with the present and the future. It is an attractive and orderly review of the copious material buried in the reports of Royal Commissions on local government in general and on particular matters such as education, public libraries, police and land drainage. Nearly half the book is devoted to the existing structure of local government. He notes the anomalies and inequalities of population, rateable value and geographical area, for which historical accident rather than logic is responsible. He discusses the holes torn by the county boroughs in the territory of the counties, the weakness of small authorities and the limits of self-determination. The frequency of unopposed returns at county council elections indicates to him apathy rather than satisfaction. Mr. Robson's progressive views are clear when he proceeds to consider the functions of local authorities. Direct labour in building, municipal savings banks and printing works, municipal coal or milk supply—these activities do not affright him. He advocates joint action by boroughs for the purpose of fire insurance or for the flotation of municipal loans. Naturally he has no love for the restrictive doctrine of *ultra vires*, which he accuses of cramping the cultural development of provincial England. Municipal encouragement of drama and opera in other countries convinces him that collective control of the æsthetic environment is as feasible as collective control of the sanitary environment. Another restrictive influence, the district auditor, is represented as devoid of practical administrative experience, exercising over unauthorized expenditure a control which is narrow and lacking in vision. Touching the future of the municipal civil service, Mr. Robson elaborates interesting ideas which he has already outlined elsewhere. He criticizes the method of recruitment and the scandals of patronage. He doubts if legal qualifications are necessary for a town clerk ; he advocates interchange between national and municipal officials ; and, like many others, he would eliminate the part-time medical officer.

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[1] *The Development of Local Government*, by W. A. Robson, Lecturer in Industrial and Administrative Law at the London School of Economics (London : Geo. Allen & Unwin, Ltd.). Pp. 362. 12*s*. 6*d*. net.

The book comes too late to be a guide to those who considered and devised the Local Government Act of 1929, too early to tell us how that Act has worked. Largely written, it would seem, before the Act was drafted, certain passages advocating a particular reform have to be rounded off with a sentence or footnote referring to what has since been done by the Act of 1929 or by the Land Drainage Act of 1930. Mr. Chamberlain's Act, with its movement towards fewer and larger local authorities, joint action by authorities, revision of area boundaries, co-ordination of hospital facilities, unification of health services and so on, is perhaps a more important step than Mr. Robson's Preface would seem to allow. But Mr. Robson is fully entitled to say that the Act leaves his facts and arguments undisturbed. It would indeed have been a misfortune if this useful and stimulating book had been withheld from publication merely because Parliament had already begun to give effect to some of its conclusions.

C. T. C.

LAW AND PRACTICE IN DIVORCE.[1]

Mr. William Latey, with Mr. D. Perronet Rees, has prepared the eleventh edition of this book, which will hereafter bear his name.

In the main, of course, it is what it purports to be : a comprehensive textbook on the law and practice in divorce and matrimonial causes in England, but it includes much that is of interest to the student of comparative legislation and international law. There is, for instance, a section on the conflict of matrimonial laws throughout English-speaking countries and the civilized world, which contains a summary of the grounds of divorce in many countries.

The subject is capable of great expansion, but Mr. Latey has rightly confined himself to those points which will most usefully serve the English practitioner. He points out the different conceptions of domicil in the English and continental legal systems, and the difficulty of securing a uniform definition. In an earlier chapter he discusses the principles which have governed the exercise of jurisdiction by the English court since 1895, when the principle was for the first time formulated by

[1] Browne and Latey's *Law and Practice in Divorce and Matrimonial Causes* (11th edition) incorporating Oakley's *Divorce Practice*. By William Latey, Barrister-at-law, of the Probate and Divorce Court; and D. Perronet Rees, of the Divorce Registry. (London : Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd.) 1931. Pp. 1103. Price £2 10*s*.

a court of supreme authority that the domicil for the time being of the husband was the only true test of jurisdiction in suits for dissolution of marriage. He deals with three recent cases which have developed that doctrine to its logical extreme, and abolished the former exceptions which, if not entirely orthodox, did something to mitigate the asperities of its rigid application. The first of these is *Attorney-General for Alberta* v. *Cook*, ([1926] A.C. 444), in which it was finally decided that even a decree for judicial separation will not enable a wife to acquire a domicil different from that of her husband so as to entitle her to sue for divorce in a court other than that of the husband's domicil. The next is one in which the court refused to follow the opinion of Sir Gorell Barnes in *Armytage* v. *Armytage*, ([1898] P. 178). Since that case it had been considered that a husband who had deserted his wife, and had until the desertion been domiciled with her in this country, would not be allowed to assert for the purposes of a suit for dissolution of marriage instituted here by the wife that he had ceased to be domiciled in England. This exception to the general rule avoided the injustice of compelling the wife to follow the husband from country to country in an attempt to obtain relief, but it has received a severe blow if not its quietus in *H.* v. *H.*, ([1928] P. 206). The third case is *Inverclyde* (otherwise *Tripp*) v. *Inverclyde*, ([1931] P. 29), in which the doctrine that the court of the husband's domicil has exclusive jurisdiction was extended to suits for nullity of marriage on the ground of impotence. Mr. Latey discusses the last-mentioned case on p. 55 of his book and expresses a doubt whether as suggested in the judgment a decree for nullity of marriage on the ground of impotence can rightly be regarded as one which has the effect of dissolving an existing marriage. There are some who think that in coming to his decision the learned judge who tried the case laid down the law as it logically might be rather than as it actually is: but the case does appear to be a logical development of the doctrine adopted as part of the English law in *Le Mesurier* v. *Le Mesurier*, ([1895] A.C. 517).

The true criticism of this decision and of the other cases referred to seems to be that it is of doubtful value to follow the example of the free trader in a protectionist world and to press to its logical extreme this doctrine of the exclusive jurisdiction of the court of the husband's domicil regardless of the inconvenience and often suffering which may result, while other nations so definitely refuse to adopt the doctrine as a test of jurisdiction. Mr. Latey is well aware of these difficulties. A Committee of which he is the Honorary Secretary is now considering the possibility of obtaining by international agreement some *rapprochement* between two rival tests of jurisdiction, that of the domicil of the husband applied here and in America, and that of the nationality of the spouses, which obtains in some continental countries, and it is doubtful whether such a *rapprochement* is assisted by the decisions referred to.

There is yet another exception which, it may be argued, the recent decisions have left untouched. The line of cases originating from the *dicta* of Sir Gorell Barnes in *Ogden* v. *Ogden*, otherwise *Phillip*, ([1908] P. at pp. 82, 83) suggest that it may still be possible for an Englishwoman who marries in England a foreigner domiciled abroad to present in England a petition for dissolution of marriage if the other party to the marriage has obtained in the country of his domicil a decree declaring the English marriage to be null and void. This exception, however, is not discussed, though *De Montaigu* v. *De Montaigu*, ([1913] P. 154), one of the cases in which it was considered, is referred to on p. 50 in another connexion.

Apart from its interest to students of international law, the book is one which should find a place in the library of every lawyer who is engaged or is likely to be engaged in the conduct of a matrimonial suit. "Browne & Powles," as it was originally called, has been well known to practitioners in the Divorce Court since the date of its first publication in 1864, and this 11th edition, which has been very largely rewritten and reshaped, embodies all the changes in statute and case law up to February 1931. The alterations and additions have been skilfully incorporated in the text, and the general style of this edition is a great advance on that of its predecessors. In Part II of the book, which deals with the practice, the logical arrangement of following through a matrimonial suit, step by step, from beginning to end has been adopted with excellent results, and there is a really comprehensive index.

In a letter accepting dedication, Lord Merrivale refers to it as "virtually a new work upon the law and practice in divorce and matrimonial causes," and as such it will be in constant use not only by English lawyers but by lawyers abroad.

C. M.

THE LAW OF INSOLVENCY IN BRITISH INDIA.[1]

BANKRUPTCY law is an innovation in India and derives nothing from the indigenous legal systems which were in force before the introduction of British rule. It is a foreign plant of recent growth which has so far failed to become acclimatized in its new surroundings.

It is true that insolvency jurisdiction has been exercised in the Presidency towns, first by the Supreme Courts and afterwards by the High Courts erected in 1861. But for the areas outside these towns there was till the year 1907 no insolvency law properly so called. Up to that date the only law dealing with bankruptcy matters was contained in a few sections of the Code of Civil Procedure which did little more than provide judgment-debtors with a convenient means of avoiding arrest and imprisonment.

The Provincial Insolvency Act of 1907 introduced a code of insolvency law for the Provinces which, as it served mainly to extend undue protection to dishonest debtors, proved a failure and was superseded by an amplified and more stringent enactment passed in 1920. Meanwhile the law for the Presidency towns had been codified in an Act of 1909, and these two Acts between them embrace the whole of the bankruptcy law now in force in British India. Both Acts are modelled upon the English law but differ from it in some important respects, and differ to some extent from each other. Comprehensive and elaborate as they are, they have failed largely in their intention, partly by reason of the difficulty of applying English legal principles to Indian conditions, but chiefly for want of proper machinery for their enforcement.

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[1] By Sir D. F. Mulla, Tagore Law Lectures, 1929. (Bombay: James & Co.) Pp. lxvii + 933. Price Rs.12 net.

The sanctity of a pecuniary obligation is lightly regarded in India—a fact which is reflected in the prevailing high rates of interest. A great deal has been said and written about the extortionate methods of the Indian money-lender. But there is something to be said on his side. He assumes heavy risks and suffers frequent defeat in his attempts to recover his money. His troubles only begin with the obtaining of a decree. If his debtor is a Hindu he will probably discover that the property which he supposed to be separate property is claimed as joint-family property by half a dozen of his debtor's relations and the result too often is a protracted, and frequently collusive, litigation which renders the execution proceedings totally infructuous.

Or again he may discover that his debtor is a mere *benamidár* who has no real title to the property he has offered as security. The time-honoured institution which is known in India as *benami* is a practice by which property is put in a false name. A well-known Indian administrator has described the *benami* transaction in the following words:

"The most respectable man feels that if he has no need to cheat anyone at present he may, some day, have occasion to do so, and it is the custom of the country. So he puts his estate in the name of his wife's grandmother under a secret trust. If he is pressed by creditors or by opposing suitors it is not his. If his wife's grandmother plays him false he brings a suit to declare the trust."

This description is, perhaps, overdrawn, for the *benami* transfer is not always fraudulent. The practice has descended from ancient times when self-protection had to be sought against the dangers attending the ownership of property, and it has long been recognized as legitimate both by the courts in India and by the Privy Council. But however legitimate, it is frequently resorted to as a cloak for fraud and constitutes a serious impediment to the speedy realization of just claims.

And last, but by no means least, there is the weakness of the Indian judicial system. The dilatory ways of the Indian courts—particularly those of the inferior courts—are notorious. The subordinate judiciary is overworked and unable to cope with the huge volume of litigation provided by a naturally litigious people, and is embarrassed by a cumbrous procedure, involving the preparation of a laboriously written record which is rendered necessary by an extensive and much-abused right of appeal.

In the Provinces the principal Insolvency Court is the Court of the District Judge, who is also the Sessions Judge. In this latter capacity he is occupied most of his time with heavy criminal work, both original and appellate, and can pay but scant attention to many other varieties of judicial and administrative work which fall to his lot—including insolvency work. Nor, as the learned author of this work justly observes, does the Provincial Act, 1920, afford the judge any adequate assistance in his attempts to enforce the law. The appointment *ad hoc* of a practising pleader as a receiver with a precarious remuneration and with no authority under the Act to investigate the conduct of the debtor is useless. The consequence is that the penal sections of the Act are seldom enforced ; nor is it easy to see how they can be enforced so long as the law in India, differing in this respect from the law in England, throws the burden of proof on the wrong party. Section 106 of the Indian Evidence Act provides that where a fact is especially within the knowledge of any person, the burden of proving that fact is upon him, and there seems to be no justification for the departure from this rule which is common to the Acts of 1909 and 1920. It ought to be for the insolvent to show that he acted without intent to defraud or to defeat the law.

The learned author in this careful and exhaustive survey of the law of Insolvency in British India has drawn attention to this and to other serious defects which call for speedy correction. But mere amendment of the statutes will not meet the needs of the present situation. There are many causes at work in India which conspire to defeat the purposes of all bankruptcy laws, one of which is the suppression of fraudulent commercial dealings. The way of the transgressor should be made hard, and to that end what is wanted is not merely stringent law but also stringent application of it. The effective administration of Insolvency law in the provincial areas of India is no longer a matter of secondary importance, for there are now, outside the Presidency towns, many large commercial centres. What is wanted is the establishment of special courts empowered to deal expeditiously and firmly with commercial litigation in all its aspects. This reform is long overdue. It will cost money, but as the Government in India derives a handsome profit from the working of the courts any objection on the ground of expense should be ruled out as untenable in the interests of good administration.

B. L.

THE PROTECTION OF MINORITIES.

THOUGH, perhaps, rather a work on political science than a law book, Professor Jesse Carpenter's admirable study[1] of the movements of thought and feeling in the Southern States of the American Union, prior to the Civil War of the 'sixties, cannot fail to be of deep interest to constitutional lawyers. For it deals with a perennial problem—the problem of the rights of minorities under a democratic form of government ; and such a problem can only be solved by the careful framing and sympathetic handling of the Constitution—or, alas! by the use of force. We know, unhappily, that the provisions of one of the most successful Constitutions in the world's history failed, in the case with which Professor Carpenter deals, to avert one of the greatest tragedies in that history. It is evident, therefore, that the problem is of no small difficulty.

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[1] *The South as a Conscious Minority*, 1789–1861. By Jesse T. Carpenter, Ph.D., Assistant Professor of Political Science in New York University. (N.Y. University Press, 1930.) Price $4 50*c*. Pp. 315.

Professor Carpenter writes frankly as a sympathizer with the South, and makes no pretence of putting forward a case for the North. We cannot, therefore, regard his book as a material contribution to the settlement of the ethical questions raised by the problem of minorities generally, or of the particular minority with which he deals. Upon these questions men will probably differ till the end of time; and, after all, they are not, primarily, questions for lawyers as such. But a carefully documented and fairly objective presentation of the processes which led up to the tragedy of the war, involved as these steps were with the specific provisions of the Constitution, cannot fail to be of interest to lawyers; and this is what Professor Carpenter has given us.

Adopting chiefly as his material the contemporary records of speeches, private and public correspondence, controversial pamphlets, and, to a less extent, the subsequent accounts of text-writers and biographers, the author has shown that, from the foundation of the Union, the sharpness of the line—geographical, economic, political and social—which separated the North from the South was fully recognized by statesmen and politicians, and that steps were taken by the framers of the Constitution to create a balance of power between them. One of the most curious delusions of the Southern representatives at the constituent conference which led to the adoption of the Constitution was, that the admitted inferiority in population (especially white population) in the South would, by reason of the latter's greater area and assumed superiority of climate and potential wealth, shortly disappear. It was mainly owing to the confidence engendered in them by this belief that the Southern representatives accepted the principle of population as the basis of representation in the Lower House of Congress, as against the principle of equal representation in what they fully intended should be the Upper and more powerful House. But the mistake was fatal; for as (especially after the Missouri compromise of 1820 over the creation of new States) successive censuses showed a rapidly increasing growth of the North, the power of the latter came to dominate not merely the Lower House, but, what was far more important from the standpoint of the South, the presidential elections. And the long series of Southern Presidents, with their power and prestige, threatened to become a mere legend of the past.

Professor Carpenter's main task is to show how, before the extreme step of secession was openly advocated, three successive lines of defence against what was believed to be the undue predominance of the North were adopted by the South. The first, which he calls the "principle of local self-government," was an appeal to the obvious fact, that the Constitution had deliberately created a central or federal government of only limited powers, and to the feeling that any attempt to extend those powers was a breach of the federal compact. This view, of course, if upheld, would have placed close restrictions on the power of the government at Washington, and correspondingly increased the power of each State to manage its own affairs. It is the basis of what afterwards became the famous doctrine of "State sovereignty," the guiding star of the Southern leaders in 1861. Unfortunately, the Constitution, almost necessarily, contained certain rather vague supplementary clauses, designed to prevent the undoubted powers of the federal government being held up by objections as to the means employed to give effect to them; and these supplementary, or machinery, clauses, when interpreted by Supreme Court judges, were, in the eyes of the South, perverted to confer upon the federal Congress powers which the Fathers of the Constitution never intended to be federal in exercise.

Driven thus from their first line of defence, the advocates of Southern claims fell back, towards the end of the 'forties, on what Professor Carpenter calls "the principle of the concurrent voice," *i.e.* the view that, on questions manifestly affecting different interests in different ways, the interest of the absolute majority should not prevail, but that some compromise which should represent the interests of both should be adopted.

This second line of defence was, obviously, less easy to define than the first; because it was hardly capable of being stated in legal terms. It involved a constant give and take which, inevitably, provoked many disputes. But, perhaps for that reason, it was more effective in practice, as being applicable in the new conditions which so frequently arose in a rapidly developing society. The Constitution itself had deliberately provided for automatic checks and balances by its rigid separation of powers between the executive, the legislature and the judiciary; and President Jefferson's grim comment on Chief Justice Marshall's famous decision in *McCulloch* v. *Maryland*, though delivered many years before the formal establishment of the doctrine of the "concurrent voice," was a significant forecast of later developments.

Nevertheless, as the tide of material prosperity set in with ever-increasing power towards the North, the inherent weakness of a principle which, in the last resort, could be overridden by sheer voting power, became more and more apparent; and, in the last stage of the ante-bellum period, the South developed yet a third principle of defence, known as that of "constitutional guarantees." In appearance, this line of defence was irrefragable; for all parties to the approaching conflict professed to regard the Constitution as sacred, however they might differ as to the interpretation put upon it. And there could be no manner of doubt that the Constitution did, in express terms, recognize the institution of negro slavery, that Congress had, again and again, passed Fugitive Slave Laws to give effect to its provisions in that respect (notably Article IV (2)), or that the Free States had in the later 'fifties, under pressure of the growing feeling against slavery, not merely thwarted the execution of the Fugitive Slave Laws, but passed statutes in their own legislatures which practically nullified them. By this time, however, the attitude of the Executive towards the Judiciary, which Jefferson had expressed in his famous dictum, was working in the opposite direction; and it was clear that a Free State President would never attempt to enforce federal execution of a Supreme Court judgment which antagonized a Free State. Finally, a desperate proposal of the South to amend the Constitution, with a view to rendering Southern claims more effective, was met by the growing certainty that, in a very short while, the Union would contain a majority of Free States sufficient to amend the Constitution according to its own views. It was this certainty which rang down the curtain on the legal drama, and quickly brought about secession and the Civil War.

Professor Carpenter's book is of such importance, and such interest to students of politics generally, that one could wish that he had included within it a few more details which would have added to its attractiveness for foreign readers. No doubt his omissions give little trouble to those familiar with the facts of American history. But these persons, it is to be feared, are not often to be found in foreign countries; and to such persons a little help might well be given in a new edition. Thus, a map showing, amongst other things, the position of the "Mason and Dixon line," a list of the dates at which, after 1789, the different Territories and States were created, and a similar list of the Presidents with their political sympathies, are examples of aids which would attract the foreign reader. On the other hand, it would not be fair to expect an American writer, writing primarily for his compatriots, to call attention to the cases in which America uses a word in one sense and other English-speaking countries in another. Yet such differences are a frequent source of misunderstanding, as, for example, when Professor Carpenter writes of a motion or resolution being "tabled," *i.e.* carried, whereas, to an English reader, "tabling" a motion or resolution merely means proposing it.

EDWARD JENKS.

PEACE SOCIETIES AND PEACE MOVEMENTS.

IN his *History of Peace*,[1] Mr. Beales gives an interesting summary of the origin, aims, progress and personalities of the various Peace Societies and Peace Movements that have operated in this and other countries since the close of the Napoleonic Wars in 1815. The summary is preceded by an introductory chapter dealing on general lines with ideas of war, pacifism and internationalism, and a second chapter which shortly describes the evolution of schemes of world peace from the earliest times down to 1815.

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[1] By A. C. F. Beales, M.A. (London: G. Bell & Sons, Ltd., 1931.) Pp. viii + 355. Price 16*s*. net.

Starting, after these preliminary chapters, with the statement that "organized pacifism may be regarded as one manifestation of the humanitarian movement which was quickened into action by the Napoleonic Wars," the author proceeds to describe how one David Low Dodge, a New York merchant of non-resistant principles, founded on August 14, 1815, the world's first Peace Society on the basis of a pamphlet he had written entitled *War Inconsistent with the Religion of Jesus Christ.* Simultaneously a movement for the promotion of permanent and universal peace arose in England, and at the instance of one William Allen, who gathered his friends round him at his house in Lombard Street, the British Peace Society was founded on June 14, 1816. These beginnings heralded a movement which subsequently grew and extended, first in England and America and later in other countries, over an ever-widening field and with an ever-expanding influence, until the Great War brought a startling interruption of its activities.

The author has found it possible to distinguish certain periods which mark different stages in the development of the movement. In respect of each period he traces the progress in different countries: new societies formed, old societies amalgamated, peace congresses instituted, links formed between countries, international federations organized, new personalities emerging, new forms of popular appeal adopted, new ideas and policies obtaining sway.

In the earlier days of the movement the societies, working in isolation, were mainly engaged in propagating a religious and humanitarian pacifism, which ruled out war of every kind and regarded peaceful persuasion as the only justifiable weapon. At a later stage, under the influence of the free-trade movement, economic ideas became entwined with the idea of peace. Co-operation arose also with groups of people promoting other humanitarian objects, such as temperance and the abolition of slavery. The Peace Societies were by this means brought increasingly into touch with politicians, Parliaments and the press. Their programmes became more practical, looking less to a strict pacifism and more to an internationalism which admitted a place for defensive war against aggression and for concerted warfare by the community of nations to punish an aggressor. They began to aim at concrete international arrangements to supersede the old haphazard system of foreign alliances and negotiation as bulwarks of peace.

Vague ideas of a Congress of Nations were conceived in the earlier days as the ultimate means of establishing world peace. More definite proposals were later evolved. The idea of a United States of Europe was put forward by a society founded in Geneva in 1867. Arbitration came gradually to be looked upon as the most practical policy, and, as the peace movement came more and more to gain influence with statesmen, the negotiation of treaties and conventions for international arbitration became increasingly the object of endeavour. Disarmament was looked upon as an object to be attained as a result of peace arrangements.

In 1899 and 1907 the societies had a great reward for their labours in witnessing the collaboration of official representatives from practically the whole civilized world, at The Hague Conference, in establishing permanent machinery for international arbitration, and making progress towards the founding of an international judicial court and the development of international law by means of general conventions. The Conference was planned to meet again in 1915, and would doubtless have become a permanent institution and an increasingly important instrument of world organization if the Great War had not intervened.

This record of the progress of peace ideas, peace propaganda and peace organization during the hundred years from 1815 to 1914 gives the reader the impression of a tide steadily rising and spreading out and flowing rapidly onwards until in 1914 the militarists made a final and unavailing fling against it.

In the closing chapters the period after this hundred years is looked at, and the progress of the peace movement and the history of the Peace Societies during and since the war are sketched. For the then existing societies the outbreak of the war involved great searchings of heart, a large measure of paralysis and in many cases a complete suspension of activities. Many of their adherents in the belligerent countries could not easily accommodate their minds, steeped in abhorrence of all war, to the changes of method and outlook necessitated by a war which made such exigent demands upon the loyalty and co-operation of all citizens. Amid the turmoil of war the very word "pacifist" became a term of reproach. Fortunately, however, for the future of the world, the tragedy of the war excited a movement of feeling and opinion which led to the formation in several countries of new groups and societies which undertook the task of studying, during the war, how the eventual peace settlement could be made the means of establishing a permanent international organization to render a repetition of the tragedy impossible. Notable among these were the "League of Nations Society" in England, the "League to Enforce Peace" in the United States of America, a society in Holland and another in Switzerland. By such societies and by organizations in the Scandinavian countries a work was done during the four years of war parallel to that carried out by the older Peace Societies during the preceding hundred years. By concentrated efforts they succeeded in reaching conclusions, formulating schemes, enlisting popular support and securing the attention and approval of statesmen and politicians; and when the war ended, the machinery for permanent peace, which they had conceived and had christened in advance "The League of Nations," was brought into existence by the first clauses of the Peace Treaties.

Though the movement out of which the League was projected was thus associated mainly with new groups and societies, it really represented but a new stage in a long course of evolution, which this book traces back to its earlier pioneers. Looking around now at the legacies of the war, one finds small ground for satisfaction or hope except in the new organizations and methods established as a result of the foresight, industry, persistence and courage of the pioneers of the League.

One parts from this history with the reflection that the process of evolution is far from being at an end, and the development of the League into the universal and more effective instrument necessary for ensuring peace, justice and prosperity throughout the world will yet require an output of individual effort and enthusiasm in this and other countries even greater, it may be, than that depicted in these pages.

The book is well arranged and interestingly written. A bibliography is appended, and there is a useful index. The references to the doings of many persons, some famous, some little known, some deserving of larger fame, help to keep the interest sustained.

The author says well at p. 168 that there is room for a feeling stronger than regret that only a tiny fraction of the English-speaking public has ever heard mention of two such men as William Ladd and Henry Richard; but there is perhaps a tinge of exaggeration in his further remark that to their plans for the future no subsequent peace efforts have added a single new idea.

F. N. K.

PROBLEMS OF PEACE.[1]

THIS new series of summer lectures at Geneva fully maintains the high level of interest and value attained by its predecessors. The subjects of the lectures cover a wide range. The lecturers are a group of men of high competence and authority. In the course of the lectures many of the most important problems of current interest in connexion with international relations and the League of Nations are ably explained and discussed. For those who concern themselves with questions of international co-operation and the organization of the world for peace the book provides a wealth of material for thought.

The opening lecture is by Professor Rappard, Rector of Geneva University, on "The Beginnings of World Government." He is followed by Mr. H. B. Butler, the Deputy-Director of the International Labour Office, who gives an interesting account of the work, constitution and methods of procedure of the International Labour Organization, and refers to certain new problems that are now beginning to emerge in connexion with its activities. Mr. G. A. Johnston, of the same office, deals with the similarities and dissimilarities between the procedure of the International Labour Organization and that of modern Parliaments.

Sir Andrew McFadyean, formerly Controller of Controlled Revenues under the Dawes Plan, and General Secretary to the Reparations Commission, writes about "International Banking and Finance." He explains shortly and lucidly how the obligations for reparations and inter-allied debts differ in their nature and effects from ordinary indebtedness, and outlines the history of the various proceedings in regard to them, including the creation of the Bank for International Settlements. He describes the international character of finance, and ends with the cheering belief that "when we have advanced farther on the path of international collaboration, international finance can provide, perhaps, the most effective and bloodless of sanctions for the punishment of aggression and the maintenance of peace."

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[1] Fifth Series, being Lectures delivered at the Geneva Institute of International Relations in August 1930. (London: Humphrey Milford, Oxford University Press, 1931.) Pp. xvi + 332. Price 8*s*. 6*d*. net.

Professor André Siegfried, of the Ecole des Sciences Politiques at Paris, in a very interesting lecture, discusses "the Economic Causes of War." Dr. F. G. Boudreau, of the Health Section of the League of Nations Secretariat, tells about the recent activities of that enterprising and successful body, the Health Organization of the League, including the work of its Eastern Bureau at Singapore, and the assistance given by the Organization to the Chinese Government in relation to the development of medical and public health arrangements in China.

Dr. L. Kastl, formerly German member of the Mandates Commission, deals with "Colonial Administration as an International Trust." Professor Gilbert Murray, in a lecture entitled "National Tolerance as an International Obligation," discusses the difficulties involved in the handling of the problems of the ethnic, religious and cultural minorities in various European States. Professor Manley O. Hudson, of Harvard University, lectures on "The Administration of International Justice."

Professor J. L. Brierly, Professor of International Law at Oxford University, provides an able and interesting lecture on "The Legislative Function in International Relations," and in the course of it treads on some controversial ground. He has a good deal to say of a general character about law and legislation, and their application to international relations, and deals also with the question of codification and the recent attempt to grapple with that subject made, with poor success, by a conference held at The Hague, on the invitation of the League of Nations, with the object of drafting proposals for uniform international law on three particular matters.

He admits the need, in the international realm, for legislation, the modern method of law-making, and writes admirably as to the necessity for removing or mitigating causes of discontent, and the danger of clinging to the delusion that there can be finality in the legal order among nations. He admits also that there is inconvenience in having to legislate for international affairs by a process requiring unanimity ; but he seems, perhaps, rather to exaggerate the difficulty of departing from the rule of unanimity, and to make insufficient allowance for the practical considerations that tend to make majority decisions necessary if the organization of peace is to work successfully.

He expresses the view that "it is unlikely that in our time we shall see any formal abrogation of the requirement of unanimity in international decisions of first-rate importance." This statement seems to overlook the fact that Article XV of the Covenant already makes a recommendation of the Council of the League effective notwithstanding an adverse vote by the representative of a State party to the dispute, and seems also to attach inadequate significance to the fact that many States have undertaken obligations to submit legal disputes to an International Court which is empowered to give decisions by a bare majority of the judges. The necessity for avoiding another world war is an argument of overpowering strength, and circumstances may occur at any moment to drive it home more effectually. This should speed up the activities of governments in developing the organization of peace, and make them more reconciled to the acceptance of conditions involving majority decisions.

The volume further includes a lucid and well-reasoned paper by Mr. W. Arnold-Forster on " Order and Self-Defence in the World Community," and a brilliant contribution by Mr. J. L. Garvin, editor of the *Observer*, entitled " The League of Nations and the English-speaking World," in which, besides writing some admirable prose, he gives a strikingly realistic presentation of the relative positions of the United States, the British Empire and Europe, in connexion with the League and the Kellogg Pact, and of the difficulties involved in the application of Article XVI of the Covenant under the present constitution of the League, with the United States absent. Professor S. de Madariaga, formerly Director of the Disarmament Section of the League, writes also brilliantly, and with his usual humour and lightness of touch, on " The Difficulty of Disarming."

Professor A. E. Zimmern, formerly Deputy-Director of the International Institute of Intellectual Co-operation, winds up the series with a lecture on " Education for World Citizenship," in which he discusses the need for international co-operation in educational matters, the principles by which it should be guided and recent activities directed to securing it.

An Appendix sets out tables of the contents of the four preceding annual volumes.

F. N. K.

PUBLIC AND PRIVATE INTERNATIONAL LAW.

DR. LEO GROSS has given us an interesting philosophical study[1] of the theories of Pacifism and Imperialism which, in his view, essentially represent the conflicting doctrines of Kant and Hegel, as advocates respectively of the doctrine of the State as *Recht* and as *Macht*. It is no doubt difficult to say much that is new on this well-known theme, but Dr. Gross's criticisms of current views reveals that the glorification of war as a necessary part of things has able supporters on the Continent, and his formal investigations, however little they accord with English predilections, are effective, and not without value for those concerned with the part to be played by the League of Nations in the evolution of a better system of international relations and the reform of international law. His own thesis is essentially built on Kelsen's theory of sovereignty. He traces the evils of the existing system to the false conception of international law as a relation between sovereign states, which are in themselves ends, and not merely means. He opposes, therefore, the current doctrine that international law is concerned only with relations between states, reducing states to mere modes for realizing the interests of mankind. A state, he points out, is based as regards its own citizens on the idea of the welfare of the whole mass, but as against other states it tends to adopt a dangerous individualism which sets the well-being of its own people over against the interests of the people of other states, and it is an essential feature of progress to break down this false isolation and to recognize that this conception of the character of the state is the inevitable root of war. This doctrine is sufficiently satisfactory to render it needless to regret that it is frequently expressed in terminology too closely connected with metaphysics to have much popular appeal.

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[1] *Pazifismus und Imperialismus*. (Leipzig: Franz Deuticke, 1931.) Pp. x + 453.

Professor Ellery C. Stowell gives hearty support to the doctrine that individuals, not states, are the true subjects of international law.[1] It has its origin, he points out, in the laws of warfare, the rights of alien merchants, and later in time humanitarian rights, and of these only the first has any immediate concern with states. Fundamentally the law of nations is a law of individuals, enforced through the agency of the governments of the communities into which humanity is apportioned. It is therefore only on the score of convention and convenience that he continues to treat states as the normal subjects of international—or, as it more properly should be styled, supranational law. His conception of international law, as essentially intended to secure the peaceful progress of the communities of the world in the interest of the individuals composing them, colours the whole of Professor Stowell's outlook, and harmonizes well with his view of the mission, which is cast by the nature of things on the great progressive states of the world, to intervene when necessary in order to secure tolerable conditions in the less well ordered communities. No better theoretic apologia for the rights claimed over the minor states in her proximity by the United States can possibly be brought forward, but it necessarily negates entirely the effect of the older doctrine of the equality of all sovereign states. Hence is derived the doctrine of the vicarious enforcement and supervision to supplement sovereign action and cure its defects (Part IV). When a state fails to live up to its international obligations and to afford just protection to the nationals of another state, the latter may act justly itself, even on the territory of the delinquent, and perform for it the functions which it has neglected to fulfil. The obvious and grave objection to this doctrine is that there is every possibility—even in the case of the United States—that intervention may be dictated by selfish rather than by humanitarian interests, and some weight also must be allowed to the view that it may be better for a community to be allowed to govern itself than to be too closely supervised even by a benevolent power. The corrective for selfish action doubtless lies in the existence of some such organization as the League of Nations, but the author hardly shows as much enthusiasm for this institution as the logic of his position demands. Probably its immediate shortcomings rather than its prospects diminish his enthusiasm. But he shows a curious hesitation in regard to condemnation of war ; in addition to citing, though without endorsing, Ruskin's beautiful panegyric (p. 744), he poses (p. x) the problem whether preparation for war may not be destined to eliminate from the direction of world affairs those states which are unable to hold their own in the race to provide armaments. Here again we have a theoretic explanation of the colossal armaments of the United States, but it is really difficult to homologate the doctrine suggested. One can hardly regard Canada as falling behind in the eyes of the world because her armaments are infinitesimal.

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[1] *International Law.* (New York: Henry Holt & Co., 1931.) Pp. xxvi + 829.

The ordinary topics of international law receive treatment at very varying length, apparently largely as they attract the writer, state succession, for instance, being dismissed in little over a page (pp. 43–5), the major portion of which is devoted to the very distinct issue of the mere succession of one government to another as opposed to the conquest or cession of state territory, while extradition is the subject of a long examination (pp. 261–78) which brings forward no new material. But despite this unevenness of treatment, the point of view is often fresh and suggestive and forms a useful reminder that jurists of each nation must look at international law issues largely from the point of view of the practice and ideals of their own countries, a fact which has played so marked a part in preventing the making of substantial progress with the amendment of the law of nations through the agency of the League of Nations.

From his standpoint it is natural for Professor Stowell to hold that it is wrong to deny that private international law is part of the law governing the relation of states. To avoid a mere question of terminology, it must be pointed out that he does not really meet the point of the position impugned. What is asserted in substance is that the law between states does not contain any provisions of an obligatory character on this head, or, in the words of American jurists from Story onwards, that the respect paid to foreign law in deciding cases with a foreign element is due to comity, not to strict legal obligation, a fact which explains the common practice of State courts in America to give a fuller or more restricted application to foreign law according as its adoption would not or would affect unfavourably the interests of its own citizens. Professor Stowell asserts (p. 305) that each state is under an international obligation to perfect a system of assimilation of law adequate to do substantial justice to aliens in controversies involving their private rights, whether towards nationals or other aliens. But this assertion seems purely subjective. In point of fact the one distinctive feature of the last century and of the present is the divergence of views of the basis of personal rights between the Anglo-American doctrine of domicil and the continental preference for nationality, and any obligation to assimilate seems equally denied by both schools of thought. Nor does the author realize apparently how little success the continental Powers have attained in their efforts *inter se* to regulate such issues as marriage or even the less delicate topic of bills of exchange. Similarly, though he treats of the enforcement of foreign judgments as part of international law (pp. 251–8), it must be noted that no obligation can seriously be asserted in this regard, while it should be observed that the strict rule of reciprocity demanded by the Supreme Court of the United States in *Hilton* v. *Guyot*[1] is not binding in certain matters on State courts and is not followed by them.[2]

The extraordinary complexity of the issues of the conflict of laws, to use its more convenient title, is adequately portrayed in the admirable treatise of Professor Leo Raape,[3] in which he annotates and expounds the terms of the Introductory Law of the German code. The method of treatment is interesting in comparison to the rigid adherence to judicial decision demanded of expositors of the topic in England. Full use is made of the many decisions of German courts, and constant reference occurs to the regulation, statutory or judicial, of like topics outside Germany, but the author is at liberty to explain his personal views, and to hold even decisions of the Reichsgericht erroneous when he sees fit, in the knowledge that, when a similar case in future comes before the courts, they are free to consider his contentions and to pronounce their own views. The amazing complication of situations which can arise through the adoption of nationality as the criterion of status is fully illustrated, and there is a most illuminating discussion of the *renvoi* in all its aspects, while the author is so much up to date that he can criticize freely the results of the latest legislation of the U.S.S.R. which reduces marriage to a contract terminable at pleasure without judicial intervention by either party. Could two British subjects obtain a domicil in Russia, and could one of them then terminate the marriage contracted between them while domiciled in England, so that in England it would be deemed dissolved, and both would be free to remarry without criminality? Adherents of the doctrine of nationality can, of course, easily negate this possibility, since domicil would effect no change of status, but for England the result must depend on the unsolved question whether English law will recognize a divorce even in the country of domicil if not pronounced by a judicial body. There are *dicta* against it in *Mir-Anwaruddin's* case,[4] and in *Papadopoulos* v. *Papadopoulos*,[5] and the position is extremely obscure. One sympathizes with the view first taken in *Nachimson* v. *Nachimson* [1] that, when marriage is a mere civil contract, terminable at pleasure, and when legitimacy and illegitimacy do not exist in Soviet law, the marriage is a relationship which really stands apart from the remedies of English courts, just as they refuse to enforce as between the spouses rights arising from Mahomedan marriages simply because they do not feel themselves in a position to do so satisfactorily. On this and on the numerous other points of importance dealt with in the treatise the author is most interesting, and his learning in matters of English law of so high an order as to assure confidence of his accuracy in other matters.

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[1] (1895), 159 U.S. 113.

[2] See, *e.g.*, *Johnston* v. *Compagnie Générale Transatlantique*, 242 N.Y. 381.

[3] *Einführungsgesetz, 2 Teil: Art* 7–31 (*Internationales Privatrecht*). (Munich: J. Schweitzer Verlag (Arthur Sellier), 1931.) Pp. xi + 855.

[4] [1917] 1 K.B. (C.A.) 634.

[5] [1930] P. 55.

Of a different but from the student's point of view a very useful character is Dr. W. N. Hibbert's collection of leading cases on the conflict of laws.[2] We may regret that we have nothing to set beside the admirable collections of Beale and Lorenzen, but even if we had, the work would be too elaborate for students, who have no justification for not making use of this handy work to bring reality into their study of a rather perplexing topic. If one misses some cases one would wish to see inserted, that is inevitable, and all that is necessary is to note that, perhaps *per incuriam*, the cases of *British South Africa Co.* v. *Companhia de Moçambique*, *Bank of Africa* v. *Cohen* and *Lorillard, In re*, appear with slight variation in two places, while cross references would have sufficed ; the last named has suffered severely, for in both citations the reference is given to [1923] 2 Ch. 636 instead of [1922] 2 Ch. 638, and the defendant who figures as Catforth in the Law Reports appears impartially as Cudforth (p. 113) and Cadworth (p. 184). More important is the comment (p. 114), where that decision is held to accord with the decision that the rights of creditors against the estate of a deceased person are governed by the *lex fori*. But the point was one not touched on in that decision, namely the rights not of creditors in the normal sense, but of beneficiaries, and the case goes to the limit in denying the importance of domicil. The position [3] was that the deceased was domiciled in New York, that there were creditors there with debts good by the law of his domicil, and that these claims were time-barred by English law. One would have thought that the claims of a man's creditors were the first thing to be considered, and that the English court would have done justice if it had ordered the balance of the English administration to be sent to the domicil in order that the creditors should receive their due, whatever remained being allocated to the beneficiaries. The decision to distribute to the beneficiaries meant, after all, depriving the creditors of what they were lawfully owed according to the law of the deceased man's domicil, and it may be supposed that a man desires his debts to be paid before

[1] [1930] P. 85 ; (C.A.) 217.

[2] *Leading Cases in Conflict of Laws.* (London : Sweet & Maxwell, Ltd., 1931.) Pp. xxi + 298. Price 21*s*.

[3] See Dicey and Keith, *Conflict of Laws* (ed. 4), pp. 936–9.

benevolence is bestowed from his estate. American precedent favours in these matters justice before generosity, and, though the legality of the action taken was obvious, and did not require the authority of the Court of Appeal to assert it, the propriety was the real question at issue, and that appears not to have been sufficiently pressed on the court below.[1]

On principle again it is difficult to accept the criticism (p. 27) of *Annesley, In re*,[2] in so far as it asserted that the testatrix had become domiciled in France. Domicil in English decisions is not a legal relationship resulting from permanent residence in a country,[3] whence it might be logical to conclude that, if the country of residence attaches no legal consequence to such residence, domicil cannot there be acquired. English courts regard domicil as the permanent home, not as a legal relationship at all, and all they say is that the law which the country of the permanent home applies to a person who dies having such a home there is the law to govern, not as, for instance, Italy holds, the law of the person's nationality. When this fact is realized, it is clear that no rules of foreign law as to the effect of residence affect the matter at all ; effect may be given as in France or refused as in Italy ; nonetheless it is the law of the domicil, the country where the permanent home is, that is applicable in the eyes of English law. Nor is its position without excellent sense, for, if a person really makes a permanent home in a country, there seems every ground for holding that by doing so he may be assumed to acquiesce in whatever disposition of his property that home chooses to make. This consideration is perhaps somewhat overlooked in the suggestion[4] recently made that effect might not be given in England to a decision of the country of domicil regarding the property of a deceased person there domiciled which might appear unfair in English eyes. The real point of difficulty in *Annesley, In re*, is the fact that the lady's effort to secure her English domicil by asseverations of her intention not to change it were not allowed to weigh against her acts. Contrast the emphasis with which the House of Lords in *Ramsay* v. *Liverpool Royal Infirmary*[5] refused to hold that a most prolonged residence in England changed the Scottish domicil of Mr. Bowie. It is truly difficult not to feel that there is really a distinction between the tendency of Scottish legal opinion on this topic and a certain current of English views. In the former attitude a change of domicil requires deliberate intention and something approaching a deliberate intention to change the legal system applicable to one, if not as once suggested *exuere patriam*, while the other insists more on action.[6]

The case on Anglo-Indian domicil (p. 28) is hardly satisfactory, for it does not bring out what really justified in some measure the attribution of domicil in India to the servants of the East India Company. They went out in early days subject to an indefinite period of service, with no fixed period for retirement, and liable to recall to their duties at any time.

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[1] See *Gable's Estate, In re*, 79 Iowa, 178.

[2] [1926] Ch. 692.

[3] See Jacobs, *Law of Domicile*, s. 72.

[4] *Askew, In re*, [1930] 2 Ch. 259, 275.

[5] [1930] A.C. 588.

[6] *Conflict of Laws*, pp. 103, 104, 106.

This fact was coupled with the consideration that in many cases they seem to have had no special intention of ever returning, beyond a vague aspiration, insufficient to prevent them acquiring a domicil in India. A further reason is that adduced by Turner L.J. in *Jopp* v. *Wood*,[1] that the company was assimilated to a foreign government, entry into whose service involved an intention to change domicil. Kindersley V.-C., whose doctrine is given, evidently did not realize the nature of the Indian service before the transfer to the Crown. That English law applied as the personal law of any person thus held to be domiciled in India was the necessary consequence of the company being under English law, and the application of English law to British subjects in India, just as it is English law which governs British subjects where extraterritorial jurisdiction is exercised and in settled colonies, even if Scotsmen are among the settlers.

Again, it is very doubtful if it is correct to say (p. 142) that *Attorney-General* v. *Mill*[2] is irreconcilable with *Mayor of Canterbury* v. *Wyburn*.[3] There is the undoubted fact that the Privy Council was determined to reconcile the two cases, and it succeeded in doing so on the score that the domicil of the testator in the former case must have been held to be English, which seems indeed to be the only way of explaining the case. If the domicil had been Scots, there could have been no difficulty in holding that his will was intended to secure the purchase of Scottish lands. But it was made by a man resident in England, in English form, and one can hardly doubt that this domicil in England was the normal conclusion. At any rate it lay with those defending the bequest to prove a Scottish domicil, for in the absence of such proof the assumption of English domicil was inevitable.

Renvoi, it may be added, is dealt with (pp. 1–4), but unfortunately the case of *Bartlett* v. *Bartlett*[4] has been overlooked and the force of the decision in *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.*[5] is misunderstood. The Privy Council did not apply the *lex situs* until it had decided that the *lex situs*, Mahomedan law, on this subject did not refer back to English law for a decision as to immoveables; in *Bartlett* v. *Bartlett* it was found that (1) English law as laid down in the Ottoman Order in Council applied the *lex situs*; (2) that the *lex situs* applied English law; and (3) that English law in the territorial sense of that term should be applied. The principle in each case was the same, the result different because in each case the court decided the issue as would have been done by a court applying the local law; in Zanzibar that law made no discrimination between classes of persons, in the Egyptian case it did. Curiously enough, the essential character of both these decisions has been ignored in the recent discussion of this topic by Dean Falconbridge,[1] who thus fails to realize that the doctrine that the "law of a country" means to English courts the whole law, including its rules of conflict of laws, has the sanction of the Privy Council as well as of inferior courts. Legally, therefore, as well as practically it seems to me unassailable.

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[1] (1865), 34 L.J. Ch. 212, 219.

[2] (1831), 2 Dow & Cl. 393.

[3] [1895] A.C. 89.

[4] [1925] A.C. 377. See *Conflict of Laws*, pp. 823, 824, 934–6.

[5] [1901] A.C. 373.

A. Berriedale Keith.

AN OUTLINE OF INTERNATIONAL LAW.[2]

This manual for the use of students covers about 290 pages, the rest being taken up by the Covenant of the League of Nations and by a number of articles of the Treaty of Versailles. For the late Professor Hatschek, who had done most useful work in acquainting his countrymen with many aspects of British constitutional and administrative law, international law was only a side issue, and his two short textbooks on the law of nations cannot claim the same authority as his works in other branches of law. In the *Outline of International Law* Professor Hatschek succeeded in combining a concise presentation of the subject with a creditable accuracy of treatment. There are only occasional slips; for instance, on p. 213, where his account of the sources of law to be applied by the Permanent Court of International Justice in accordance with Article 38 of its Statute is misleading. He does not state that judicial decisions and the teachings of publicists are to be resorted to only as a subsidiary source, and that the power of the Court to decide *ex aequo et bono* is dependent upon an express agreement of the parties.

The book is divided into two Parts. Part I deals with "International Law in its Character as a Legal System," "The Subjects of International Law and the International Representatives of the Subjects of International Law." The four chapters of Part II deal with "'Mere' (*i.e.* non-juristic) International Acts," "International Juristic Acts," "International Law Juristic Transactions," and "International Law Delicts." This classification is rather artificial, and it leads the author to such oddities as the treatment of the League of Nations and of the Permanent Court of International Justice as juristic transactions. There is throughout the book ample evidence of the working of a keen legal mind and of wide learning.

The thankless task of translation has been undertaken by Professor Manning. Most probably he has been right in refraining from editing the book and from bringing it up-to-date (the German edition was published in 1926). The method of his translation has been determined by his desire to translate not only the words but also the spirit of the book. The resulting choice of language will seem to some odd in places, and the translator has answered some of the criticism in advance by the confession to the sin of "some barbarous corruption coined for the occasion as seeming a little better calculated to carry into an English mind a necessary alien idea." If the intention was to convey to the reader some aspects of a German conception of international law, then perhaps it may be argued that the novelty of thinking with which the reader is confronted should not have been aggravated by new linguistic creations. However, in matters of translation as in those of classification, two persons may be of diametrically different opinions without either being necessarily in the wrong. It is difficult not to appreciate the care, industry and ability with which the translator has performed his task. A perusal of the book shows how little substance there is in the belief that there exists a particularly continental conception of international law. The more one studies the views on international law, both in its entirety and its individual problems, prevailing in different countries, the more one realizes how uniform is the practice and the study of international law throughout the world. This is a conclusion different in part from the view which may have moved Professor Manning to undertake his task, but this does not diminish the value of the translator's work.

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[1] *Law Quarterly Review*, xlvii, 285. Not a single legal decision in a British court has yet been adduced clearly against the doctrine explained in *Conflict of Law*, p. 811. One may believe judges fallible, but hardly when so many judgments have been rendered in one sense, and the Supreme Court of Canada accepted it in *Ross* v. *Ross* (1894), 25 Can. S.C.R. 307, with one dissentient only, so that the issue is probably decided for Canadian courts, for it has no special relation to the law of Quebec.

[2] By Julius Hatschek. Translated by C. A. W. Manning. (London: G. Bell & Sons, Ltd., 1930.) Pp. viii + 364. Price 16*s*. net.

H. L.

INTERNATIONAL LAW.

Dr. Baty has written a new book on international law,[1] in which, as is his wont, he is deliberately provocative and not a mere expositor. He loves to make his readers sit up, to coin daring phrases, to scorn the accepted conventions of the science and to view any subject from a fresh aspect. He is a kind of Don Quixote of the law, and he sets out with his faithful pen on a voyage of adventure, to upset the innovators and the wicked persons or leagues who dare to lay hands on the sacred principles of national sovereignty.

The new basic idea which gives the title to this book is that there are four fundamental principles of international law by which all its propositions must be tested. The principles are laid down by himself, and he does not quote any authority for them. They are the canons of simplicity, certainty, objectivity and elasticity. And he holds that their recognition is necessary "if the law of nations is not to degenerate into a morass of conflicting opinions or of ukases dictated from Geneva." These "ukases from Geneva" are among the windmills against which our gallant knight is constantly tilting. It is not altogether obvious why the different topics are placed under one or other of these four principles, and the author himself recognizes this objection to his classification. But it is not the framework of the law which matters so much as the opinions of Dr. Baty, and those are full of interest as well as of controversy. Thus, to take an example from the first chapter, where the author is dealing with the well-worn subject of states and sovereignty: he argues that it is not to be reckoned as a defect that international law does not dispose of irresistible forces or of any physical force. " Physical force has no more to do with law," he says, " than wigs or parchment have." That is an over-statement ; but Dr. Baty chooses to stimulate his readers by strong expression. So again, when he treats of the doctrine of intervention and contends against the American claim to intervene on behalf of their trading subjects and corporations in foreign countries, he says, " The Hughes doctrine is destructive of the vital nerve of the international law, which is not business but self-determination." His maxim sounds a little like the motto of a Rotary club ; but there is force in the protest against the interposition of force to create a privileged class engaged in commercial ventures abroad.

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[1] *The Canons of International Law.* By T. Baty, D.C.L., LL.D. (London: John Murray, 1930.) Pp. xi + 518. Price 21s.

It will illustrate the new approach to the topics of the law if we consider a few examples of the application of the canons. Under the canon of simplicity he ranges the position of ambassadors and consuls. And he discusses the theory that has been put forward that an envoy's immunities and privileges are precisely co-extensive with the necessity for them. " Such a doctrine is naturally obnoxious to at least three of our canons. It abolishes simplicity in favour of a complicated inquiry into what is or is not necessary. It does away with the easy objective test of whether the individual is an envoy or not, substituting a difficult inquiry into matters of opinion ; and it attacks the certainty of a rule which few would have been found to question." The topics which come under the canon of certainty include sovereignty and the inviolability of territory, landing parties, pacific blockade, the three-mile limit and enemy character in prize. Dr. Baty's ideas about these subjects are well known ; here he reinforces them with the doctrine of absolute canons of the law. So, after arguing about the concept of commercial domicile in war, and showing by some original research into the early prize-court records that it was a late importation of the jurists, he concludes that the criterion of hostile or neutral character should be found in the personal character of individuals apart from their trading. And *certainty* would seem to dictate the acceptance of nationality as the criterion.

By " objectivity " Dr. Baty means that the law must leave no scope for opinion and inference, it must deal with plain fact. Under this topic he deals with the continuity of states and their recognition, on the one hand, and a number of matters of prize law on the other. He makes a powerful attack on the practice of the so-called " de facto " recognition which is popular in America. " Recognition is not a favour to be bargained for ; it is the admission of a fact." On the maritime rights of capture he holds broadly that the changes of practice since the Napoleonic wars are not valid. He is particularly opposed to the extension of the class of contraband, and the wide extension given to conditional contraband during the Great War; and he has no use for the doctrine of continuous voyage. These new-fangled ideas have destroyed the simplicity and objectivity of the old conception of contraband. He does not seem to be aware of the difficulty of reconciling the two principles of objectivity and elasticity. Yet it might be considered that the new circumstances of commerce and communications in our day demand a new development of the belligerent rights over maritime trade with the enemy and that " elasticity " justifies some of the changes. But he makes a strong point when he argues that contraband must not be made a cloak for blockade.

In general he is scornful of the new developments of international law since and during the war. For some unexplained reason he regularly refers to the League of Nations as the "Société des Nations," and the Covenant as the " Compact." Perhaps an English translation of the Covenant had not reached Japan, where the book presumably was written. Once, by inadvertence, the English name appears. But on another occasion the Covenant is itself referred to as Art. 18 of the Société des Nations. He makes no mention of the minority provisions in the Treaties of Peace, and his reference to mandates is certainly cursory, sweeping and characteristic:

" The institution of mandates," he says, " has drifted into complete chaos. The mandates of Class A, in which the mandatory is regarded as an adviser and the state as completely independent, have been interpreted so as to place the mandatory in the place of a dictator whose advice must be taken. Class B were never intended to be anything else; the administration was to be in the hands of the mandatory—and these have drifted very much into the position of Class C which were from the first regarded as incorporated into the dominions of the mandatory."

We can only presume that Dr. Baty does not read the minutes of the meetings of the Permanent Mandates Commission in his advisory functions to the Japanese Government.

He appears to have no liking either for the International Court of Justice, another new-fangled institution. In one place, indeed, he welcomes the appearance of a juristic class whose first concern is the integrity of the law, and who might be an impartial authority in prize disputes; but he does not seemingly refer here to the court. For later he describes it as " an unwieldy institution established to exercise jurisdiction over some 50 individuals; and its closest analogy is the village Panchayat of India." He holds himself that the only satisfactory system of international arbitration is the free choice of nations on each occasion that a difference exists and calls for settlement. Here, too, he would like to get back to the golden age of the early part of the nineteenth century. Dr. Baty, in fact, is a die-hard of international law, a profound student of its past and a brilliant writer of its present, but a vehement opponent of the ideas that are modifying it in our own day.

N. B.

PUBLIC INTERNATIONAL LAW: PEACE.[1]

"The commentaries with which Professor Pitt Cobbett has enriched the leading decisions are full of erudition and marked by qualities of clear and powerful thought and lucid expression." The truth of this tribute contained in Mr. Picciotto's obituary on the death of Pitt Cobbett soon after the end of the Great War becomes more and more apparent as each succeeding edition makes its appearance. The late Dr. Hugh Bellot, whose contributions to the practical advancement of the rule of law between nations have not received the universal recognition which they merited, edited the fourth edition (published in 1922) and very wisely he did not attempt to engraft on the original principles laid down by Pitt Cobbett any of his own theories. He merely supplemented or qualified Pitt Cobbett's principles by bringing up to date the author's own notes, making as little alteration as possible. In this fifth edition Mr. Temple Grey has taken the same course, but, as he quite reasonably says, "the march of events has necessitated the incorporation of some new material (especially decisions of the Permanent Court of International Justice at The Hague), room for which has been made by the elimination of a certain amount of purely historical or constitutional material readily accessible elsewhere, as also a good deal of comparative law." But he adds, "this is not to belittle the importance of comparative law."

The editor points out that case law is gaining in authority in The Hague Court, although under Article 59 it is not bound by its decisions in regard to other cases. It would have been of advantage to the student if in the index all the cases in The Hague Court or the subjects therein dealt with had been assembled together under one heading, instead of being scattered about under sub-titles which do not readily occur to the mind, *e.g.* the *Lotus* case. However, on pp. 230–2 one finds this important majority decision (in which several very eminent judges gave dissenting opinions) lucidly and concisely treated, and on pp. 170–4 the editor aptly reviews and comments upon the case of the Tunis Nationality Decrees, which illustrates the uses of an advisory opinion of the Court in bringing about a settlement out of Court after diplomatic negotiations have reached a deadlock.

For the rest Mr. Grey has exercised a nice discrimination as to the value of new cases arising since 1922. He puts the decision of the Court of Appeal in *The Fagernes* ([1927] A.C. 311) into its proper place as an *ad hoc* administrative decree hardly affecting the accepted criterion for territorial inlets, and refers in passing (at pp. 133 and 169) to the Anglo-

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[1] Pitt Cobbett's *Cases on International Law* (5th edition). Vol. I, *Peace*. By Francis Temple Grey, M.A., Barrister-at-Law. (London: Sweet & Maxwell, 1931.) Pp. 372. Price 17*s*. 6*d*. net.

American Liquor Treaty of 1924, and the celebrated case of the *I'm Alone* in 1929 in connexion with the right of pursuit beyond territorial waters. As might be expected from the publishers, this new volume is admirably got up, and no library of international law will be complete without it. W. L.

THE LAW OF CIVIL PROCEDURE OF 'IRAQ AND PALESTINE.[1]

Mr. Hooper is an amazingly industrious commentator. He has produced a book on the constitutional law of 'Iraq, another on the Mandate for 'Iraq, a third on the commercial law; and now he has edited the Ottoman law of civil procedure which is in force in the British mandated areas of the Middle East. And, what is of great value, he has furnished a reliable English translation of the code which was hitherto lacking, and of the clauses of the Mejelle—the Civil Code—dealing with evidence. In the introductory chapter dealing with the organization of the courts there are a few inaccuracies in the references to Palestine. The Court of Criminal Assize is not the ordinary criminal court, but tries only cases punishable with a capital sentence. And the jurisdiction of the magistrates' courts has been radically modified by the legislation of the Palestine Government. The author appends a number of Palestine Ordinances and Rules of Court affecting procedure, but does not include the Magistrates Courts' Jurisdiction Ordinance. The book, however, should be very useful both in Palestine and 'Iraq. And it has been well printed in Basrah, where Mr. Hooper is judge. N. B.

THE LEGAL SYSTEMS OF THE WORLD.[2]

Very few legal writers are so widely known as Dean John H. Wigmore, and his contributions to legal science during the last forty years or so are as remarkable by their variety as by their solid value. In this work he breaks new ground. This is not a book of positive law, but a bird's-eye view of the principal bodies of law deserving the name of systems which exist or have existed in the world. A rapid sketch is given of the history of each of these sixteen systems and the book is embellished with 500 illustrations.

It is an appeal to the imagination of lawyers, and dull would he be of soul who could pass by.

The author puts in the forefront an old Chinese proverb which might be commended to the astute managers of Hollywood: "One picture is worth 10,000 words." So far as we know, no one before has had the brilliant idea that the history of law might be enlivened by pictures. The collection of these illustrations of law courts of various types, of great lawyers and of specimens of legal records has been a hobby of the author

[1] By C. A. Hooper, President of the Court Basrah, 'Iraq. (Basrah: Times Printing Co., Ltd.) Pp. 209.

[2] *A Panorama of the World's Legal Systems.* By John Henry Wigmore. (Saint Paul: West Publishing Co.) 3 vols. Pp. xxxi, xv, xiv + 1206. Price $25.

for many years. The pictures are, naturally, not all equally valuable, but, taken as a whole, they do help to stimulate the reader.

Professor Wigmore confines himself to the sixteen great systems and does not concern himself with what have been styled "the unseemly customs of primitive tribes." The short histories of the different laws are written *currente calamo*, and though they are of necessity somewhat sketchy, they are the sketches of a master. One of the author's broad generalizations is "the rise and perpetuation of a legal system is dependent on the development and survival of a highly trained professional class." We believe that this is true and deserves to be emphasized. It is not necessary to deny that some law has sprung from the great heart of the people, but Savigny and his school put their case much too high. Of most modern systems it is certainly true that by far the greater part is the creation of the lawyers.

F. P. W.

ROMAN-DUTCH LAW.[1]

PROFESSOR R. W. Lee's *Introduction* has become a classic in its author's lifetime and is one of the small number of books which, though primarily addressed to students, have been found very useful by the Bench and the Bar.

Roman-Dutch law has had a strange—one might almost say a romantic—history of which Professor Lee himself gave some account in a recent issue of this *Journal*.[2] It has by this time drifted far apart from the law of the country of its origin and the chasm between Roman-Dutch law and the law of Holland is getting steadily wider. In some matters the Roman-Dutch law, like the human body, as we have lately been told, is a museum of relics. Side by side with a mass of modern legislation it retains institutions singularly archaic. This is particularly the case in the law of marriage and succession.

This new edition has been thoroughly revised and contains a very full Table of Cases.

On p. 70 it might have been well to refer to the recent law of Southern Rhodesia mentioned in the preface, which abolishes community of goods between the spouses unless otherwise stipulated.

F. P. W.

BRITAIN AND WORLD TRADE.[3]

MR. LOVEDAY is announced on the title-page as the head of the Economic Intelligence Service of the League of Nations. If authority of position can be any guarantee, his book must be accepted as a reliable statement of the economic facts on which the present industrial and financial chaos of the world rests—if chaos can properly be described as a restful basis.

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[1] *An Introduction to Roman-Dutch Law*, by Professor R. W. Lee, D.C.L. 3rd ed. (Clarendon Press.) Pp. lxiv + 463. Price 20*s*. net.

[2] *Journal of Comparative Legislation*, Third Series, vol. xii, pt. i, p. 33.

[3] By A. Loveday. (London: Longmans, Green & Co.) Pp. xxi + 229. Price 10*s*. 6*d*.

He certainly gives his readers a vast number of economic facts to consider, and each one of them seems more threatening and fatal than the last. For example, on p. 101 it is stated that "in the United States alone the tractors in use on farms increased from 80,000 in 1918 to 850,000 at the beginning of 1928." When we couple this fact with the knowledge that agriculture over a large part of the world, and particularly in the United States, is in a very serious financial condition, one wonders what is going to be the result if the increase of scientific machinery continues much longer at the present rate.

The main point which emerges from these economic essays is that Great Britain seems in a more declining financial position than any other great nation. Europe as a whole is even gaining ground again, against the tremendous growth of the wealth of the United States; but as against the rest of Europe Britain is slipping behind. Mr. Loveday gives many most interesting tables of facts and many most interesting theories and explanations of their meaning. For instance, he points out that as wealth increases, the main demand shifts from the elementary necessaries of life to the less imperatively essential things. Thus, there may grow up a more prosperous trade in gramophones and silk stockings than in wheat and cheese.

It is interesting to note that these collected essays were written at different dates; and the writer in one published in 1927 could say: "Too often we hear the word 'crisis' employed; there is no general crisis." He had just said that "the situation to-day is incomparably more favourable than it has been at any moment during the last thirteen years." From which one gathers that even the economic experts cannot yet see much farther than their noses!

It is following this soothing statement that Mr. Loveday goes on: "There is a surplus of plant, as we have seen in certain industries. England is particularly affected by the new plant in some of her former markets." Now the crash has come, and it would appear obvious to all but the blind that the chief cause of the world economic crisis is that the unlimited use of machinery has flooded the markets of the whole earth with more than they can absorb. It is interesting to note that Mr. Loveday had already detected the dangers of under-consumption: though the fundamental peril of machinery he does not appear to grasp in its full meaning. But machinery is still one of the Victorian gods; and great officials are not allowed to be too original—particularly when they write for editors who generally dread new and pungent truths as they fear the devil.

G. R. STIRLING TAYLOR.

JURISPRUDENCE.[1]

A NEW edition of a book which has a reputation so well established as Salmond's *Jurisprudence* does not need a long review. The merits of the work are universally acknowledged. It is written with that high degree of accuracy, order and lucidity which distinguished all the author's writings. From its first publication in 1902 it was recognized as being the best general introduction to legal ideas for students of English law, and it has been, and no doubt will continue to be, widely used on both sides of the Atlantic.

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[1] *Jurisprudence*. By Sir John Salmond, 8th ed. by C. A. W. Manning. (London: Sweet & Maxwell, 1930.) Pp. xviii + 580. Price 20*s*. net.

It is in some ways a typically English book. It is not a philosophy of law and, indeed, fights very shy of speculation. Those who are looking for light on the problems which underlie legal phenomena will not find much here. Salmond did not attempt to sound the abyss, and if, to use a phrase of Renan's, he gazes occasionally into its depths, he turns quickly away with the remark that this is no place for lawyers.

The editor of this edition tells us that he has made only " slight verbal changes " and that these are " scattered, without distinguishing mark, throughout the book." This we think is rather a pity. No doubt some books by being edited and re-edited become such a mosaic that it is hardly worth while to preserve the *ipsissima verba* of the author. But Salmond's *Jurisprudence* is not in that case, and Professor Manning seems to forget that a book gains in interest when the reader can see what changes have been made and why.

We think also that an opportunity has been lost of making more use of modern foreign literature in this field. Salmond, though the greater part of his life was spent " at the ends of the earth," as he himself expresses it, managed in his younger years to keep fairly abreast of French and German works on his subject, but in his later life his other occupations made this impossible. If he had had plenty of leisure and had prepared a new edition himself it is safe to say that he would have paid more attention to the continental literature of the last generation. *E.g.*, the treatment of " natural law " is really out of date. There is a mass of new work on the subject in France and Germany which is not referred to here. It is true that the modern view is to regard natural law not as " an ever fixed mark, That looks on tempests and is never shaken." It is an ideal which changes as society changes—a " law of nature, with variable content."

We may attach greater or less importance to the theory, but it certainly deserves mention in a book of this kind.

Perhaps for the ninth edition Professor Manning will try what he so oddly calls " constructive shooting." Non-destructive shooting is familiar to sportsmen, but constructive shooting is something outside our experience.

F. P. W.

DEMOCRACY, LAW-MAKING AND THE PUBLIC SERVICES.

THIS wise and temperate book[1] contains much that is valuable for us as well as for Americans. The writer knows very well the defects of democracy and deals faithfully with them. But he knows also that railing is futile and he thinks some of the remedies proposed worse than the disease.

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[1] *The Public and its Government*. By Felix Frankfurter. (Yale University Press and Humphrey Milford, London, 1930.) Pp. 170. Price 9*s*.

In spite of superficial differences the fundamental problems of democracy are the same in the two countries. How can large legislative bodies elected by the people grapple successfully with the complex questions—economic and financial much more than political—which call with such urgency for solution ?

As the author says, " the problems of statecraft a hundred years ago have the air of Arcadian simplicity."

Professor Frankfurter believes that the people are entitled to have the government they deserve and that in the long run there is no " decent and workable substitute " for democracy. In a very interesting chapter he discusses Public Services and the Public and explains the comparative failure of the Public Service Commissions to protect the interests of the individual citizen.

It is gratifying to an Englishman to read his warm praise of the English Civil Service. In the United States government officials enjoy very little prestige and the rewards are so meagre compared with what may be gained in business that it is difficult to get men of the proper stamp. Like his countryman, Mr. Abraham Flexner, he thinks that the American universities have yielded too much to the popular demand for courses considered to be " practical." They ought to be " training schools for public service not through utilitarian courses but by the whole sweep of their culture and discipline." It is a book worth reading and worth pondering on.

CLASSICS OF INTERNATIONAL LAW.[1]

It was a happy thought of Mr. James Brown Scott that amongst its other activities the Carnegie Institute might publish the classics of international law with a sound text and a new translation. Of these fifteen have now appeared. The works of some of these " fathers " were not easy to procure. Some of them had not been translated before into English and the old translations of others were inadequate. It is a useful undertaking well carried out. Whether the method of reproducing the best texts by photography is altogether satisfactory is more disputable. That of Grotius, for example, is not very pleasant to the eye. The type of Bynkerschoek here reproduced is larger and the text is clearer, but we should think that most people would prefer the printed page.

This handsome edition of Bynkerschoek's *Quaestiones Juris Publici* gives a photographic reproduction of the text of 1737, a new and excellent translation by Professor Tenney Frank and a valuable introduction by Professor J. de Louter of Utrecht.

Bynkerschoek was never famous as a Latinist, and he is sometimes obscure. It is a distinct gain to have a readable and reliable translation. And, though this is a smaller matter, it is a convenience to have the Digest cited in the modern way, *e.g.* D. xxxix. iv. ii. 2 instead of l. ii. §2 ff. *de Public et vectig.*

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[1] Bynkerschoek, Cornelius van, *Quaestionum Juris Publici*, libri dŭo. (London : Humphrey Milford, 1930.) 2 vols. Price 30s. net.

Compared with the stormy life of his great predecessor Grotius, that of Bynkerschoek was one of halcyon calm. He had a smooth and prosperous career from first to last. Unless the possession of eleven daughters may be regarded as a misfortune, no serious mischance seems to have come his way. He was for nearly 40 years (1704–43) a member of the Supreme Court of Holland, Zeeland and West Friesland, and for about half that time was its President.

Bynkerschoek has a secure place among the fathers of international law and his reputation in England has always stood high. In the old reports he is frequently cited, especially in Prize Cases. In one case the reporter has a note, "Lord Mansfield spoke extremely well of Bynkerschoek's writings and recommended especially as well worth reading, his Book of Prizes (*Quaestiones Publici Juris*)." [1]

As time goes on and precedents multiply, it becomes less necessary to rely on the opinions of the old jurists, and one may turn over many recent prize cases without coming across the names of Grotius, Pufendorf or Bynkerschoek. But when precedents are wanting Bynkerschoek is still cited with respect.[2]

He was for his time something of a modernist. A hard-headed practical lawyer with his feet firmly planted on the ground, he conceives that international law is to be found if possible in the rules and customs observed by nations in their dealings with each other and in treaties and international agreements. He rather distrusts philosophical speculation and is at the opposite pole from Pufendorf, who is always on the quest for the law of nature, and even denies that treaties and usages can make law because they are not the manifestations of a will superior to that of the subjects of the law. This is not to say that he despises reason. He says: *nulla ullorum hominum auctoritas ibi valet, si ratio repugnet. Non Grotius, non Pufendorfius, non interpretes qui in utrumque commentati sunt, me convicerint, si non conviceret ratio.* Bynkerschoek cites the Digest when it suits him, but he is quite against the practice of dragging in Paul and Ulpian by the hairs of the head when their opinions were given on points of private law and not *in pari materia* with these public questions. He has much respect for Grotius but is not at all afraid to differ from him on occasion. These are characteristics of a man who had emancipated himself from the antiquated and pedantic methods of some of his precursors and was not content like some others to formulate as the laws of nations rules spun from the writer's inner consciousness.

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[1] *Goss* v. *Withers*, 1792, 2 Burr. 690. Cf. *The Ceylon*, 1811, Dod. Adm. Rep. 105, where Sir William Scott cites Bynkerschoek with approval.

[2] As *e.g.*, by Sir Samuel Evans in *The Panariellos*, 1915, I. Treherne's Prize Cases, 195, 198.

"ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO.[1] "

THESE two volumes constitute No. 15 of "The Classics of International Law" which are being published under the auspices of the Carnegie Endowment for International Peace. The book is not so well known as the *De jure naturae et gentium*, though it contains in germ most of the ideas elaborated in Pufendorf's later and greater work. As Professor Wehberg points out, it has suffered the fate of being more quoted than read. The method and scope of the book make it unlikely that it will ever be much used except by specialists for purposes of reference. It comes from the spacious age when writers could take all knowledge for their province, and deals only incidentally with international law. It is in the section on the definition of *lex*—a definition which is in essentials that of Austin—that we find the famous statement that the law of nations has no existence apart from the law of nature, thus ranging Pufendorf amongst the "natural law" rather than the "positivist" school of international lawyers; whilst for the discussion of the vexed question of the freedom of the seas we have to turn to the definition of a *res moralis*. But whether his work is widely read or not, nothing can deprive Pufendorf of a leading place amongst those writers who have not been content to accept war as an established institution, but have asserted the principle, which lies at the base of the League of Nations, that the tests of the justice or injustice of a war are independent of its successful or unsuccessful outcome.

J. W. J.

HUGO GROTIUS.[2]

PROFESSOR R. W. LEE's British Academy Lecture on Hugo Grotius makes delightful reading. It contains a good deal of new material, some of which comes from the recently published letters of Grotius.

The literature about Grotius is enormous, as anyone can testify who saw it set out on the tables of the Library of the Peace Palace on the occasion of the Tercentenary in his honour. Much of it is in Dutch, and therefore hidden from most of us. Professor Lee's scholarly study makes full use of it.

Grotius rather suffers from excess of praise. People got tired of hearing Aristides called the "Just," and there is a tendency to revolt when a man is spoken of in such terms as:

Depositum caeli, quod iure Batavia mater
Horret, et haud credit se peperisse sibi.

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[1] By Samuel Pufendorf. Vol. I, A Photographic Reproduction of the Edition of 1672, with an Introduction by Hans Wehberg. Vol. II, A Translation of the Text by W. A. Oldfather, with a Translation by E. H. Zeydel of the Introduction (Oxford: Clarendon Press; London: Humphrey Milford.) Price, 2 vols., 30*s*. net.

[2] *Hugo Grotius*. By R. W. Lee. (London: Humphrey Milford.) Pp. 63. Price 3*s*. 6*d*. net.

Dr. Lee's valuation of him is in refreshing contrast to this, though he gives him all the credit which is his due. *The De iure belli* is an unquestioned world classic. His Introduction to the Jurisprudence of Holland, so well known in Professor Lee's translation, has had a singular fate. The codification of Dutch law has made it no longer suitable as a textbook in his native country, whereas it is still the best elementary work for students of the law of South Africa or Ceylon.

ESSAYS IN JURISPRUDENCE.[1]

We congratulate Professor Goodhart on having collected here a number of studies previously published in various legal periodicals. Among them are papers on the *Ratio decidendi,* on Case Law in England and America, on *Ultra Vires,* on Possession and on Blackmail.

Professor Goodhart has the rare advantage of familiarity with the theory and practice of the law in the United States as well as in England, and his comparisons and contrasts are of great value and interest. The article on the Legality of the General Strike deals in an admirable manner with highly controversial matter.

TAXATION AS IT AFFECTS THE DOING OF BUSINESS ABROAD IN ENGLAND, FRANCE, GERMANY AND UNITED STATES OF AMERICA.[2]

This handy volume contains articles on the taxation of foreign companies in France, Germany and the United States and another on Foreign Companies and United Kingdom Income-tax. The German and American articles include bibliographies, whilst the British article, which gives details of cases, has a useful index. The Foreign Law series, the managing editor of which is Monsieur P. O. Lapie, has an Advisory Council composed of distinguished representatives of eight countries and an Editorial Committee of which the British members are Messrs. Valentine Holmes and Cecil H. A. Bennett.

DOUBLE TAXATION.

In the first part of this learned article[3] the author propounds his general theory of double taxation and the difficulties confronting its solution. In the second part Dr. Sack gives a survey and a critical estimate of the work undertaken by and under the auspices of the League of Nations with a view to remedying the inconveniences of double taxation. He is critical of the report of the committee of experts appointed by the Council of the League of Nations as being too theoretical and as not taking into consideration the problems and needs of individual countries. He agrees, however, that there are a number of questions in the field of double taxation which can be regulated by general international conventions.

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[1] *Essays in Jurisprudence and the Common Law,* by Arthur L. Goodhart. (Cambridge University Press.) Pp. xiii + 295. Price 15*s.* net.

[2] Foreign Law Series, No. 1. (Paris: Recueil Sirey. London: Sweet & Maxwell, Ltd.) Pp. 226.

[3] *La double imposition et l'allègement de sa charge dans les travaux de la Société des Nations. Exposé critique et essai de théorie générale.* By A. N. Sack. Extract from *Revue Générale de Droit International Public,* May 1930. Pp. 97–143.

EUROPEAN UNION.

THESE 330 pages[1] of close print comprise (1) extracts from the speeches made at the League of Nations Assembly in 1929, (2) M. Briand's memorandum of May 1930, (3) the full text of the replies of the twenty-six European Governments, (4) extracts from speeches delivered at the League of Nations Assembly of 1930, together with M. Briand's comments on the replies to his memorandum and the report of the first meeting of the European Research Committee. In their introductory remarks the authors justly say that M. Briand's scheme is too important in its historical bearings to be considered solely from the point of view of constitutional law. Meanwhile, however, they look forward to the development of the projected Union into " a supra-national federal organism, inside the framework of the League of Nations, with more specialized functions." We await with interest the succeeding volume.

INTERNATIONAL INSTITUTE OF PUBLIC LAW.

THE *Annuaire* of the Institute for 1930 contains, as the previous one did, a great deal of interesting matter.[2]

It is a publication extremely useful to all those who are concerned to note changes in the constitutions or in the public law of the various countries of the world. It gives for some countries, in addition to a summary of the new legislation, an analysis of the most important decided cases in matters of public law.

The *Annuaire* also includes a number of studies by eminent lawyers on subjects of special " actuality."

If we take as an illustration the report from Great Britain furnished by Mr. E. C. S. Wade we find an admirable article by Professor H. J. Laski on the " Reign of Law," though the writer is a little hampered by the fact that he is a member of the Lord Chancellor's Committee. This is followed by a full analysis of the Local Government Act, 1929, and of Mr. Chamberlain's Circular No. 1000, by a shorter account of several other laws and by summaries of the chief cases including, *e.g.*, the judgment of the Judicial Committee as to the eligibility of women to the Canadian Senate. The special studies include among others three upon the crisis of representative democracy by M. Joseph Barthélemy, Mr. Lawrence

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[1] *L'Union Européenne.* By B. Mirkine-Guetzévitch and Georges Scelle. (Paris: Delagrave.) Price 20 fr.

[2] *Annuaire de l'Institut International de Droit Public*, 1930, *Paris.* (Les Presses Universitaires de France.) Pp. 1485. Price 150 francs.

Lowell and M. M. Vauthier respectively. These will be referred to in a note. The new or newly revised Constitutions are those of Albania, Austria, Guatemala and the Vatican City.

The work is edited by Professor B. Mirkine-Guetzévitch.

PASSPORT FORMALITIES.[1]

M. REALE describes the steps taken under the auspices of the Transit Organization of the League of Nations (1) to simplify passport formalities in general, (2) to deal with certain special cases, *i.e.* Russian and other refugees, and persons who, for various reasons, are deprived or doubtful of their nationality or are unable to obtain facilities from their country of origin. The most interesting pages in the book are those dealing with the Geneva Conference of 1927 on this subject, including the vigorous protest of the Italian delegate against the proposed extension of facilities to the last-named category.

Both the author and Professor Mirkine-Guetzévitch plead strongly for the international recognition of certain inalienable rights of the individual. " Such rights," says the latter (p. xiii), " which used to be guaranteed only by domestic law are beginning to receive international protection through public international law." The theoretical interest attaching to this aspect of the subject indeed surpasses that of the actual points at issue, though the author rightly lays stress on the practical inconvenience and the interference with the normal development of international relations between individuals which continue to result from the present system.

The book contains a useful bibliography and an appendix of some 140 pages giving the passport and visa regulations in force in the different countries. (Those for Great Britain are not correctly stated as regards the Dominions.)

It should be added that M. Reale has boiled down his 220 pages of text into 4 pages of small print in the January 1931 issue of *Foreign Affairs*.

A PANORAMA OF CONSTITUTIONS AND PARLIAMENTARY PROCEDURE.[2]

DURING the last few years there has been a notable increase in the output of annual publications covering some branch of law. Such are—to mention only a few of them—in England the *Annual Survey of English Law* and the *Annual Digest of Public International Cases* ; in Germany the annual *Sonderheft* of the *Zeitschrift fur Ausländisches und Internationales Privatrecht,* which gives German cases for the year in private international law ; in France the *Annuaire de l'Institut International de Droit Public* ; and in Italy the *Annuario di Diritto Comparato e di Studi Legislativi.*

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[1] *Le Régime des Passeports et la Société des Nations.* By Egidio Reale, Docteur en Droit, Avocat à la Cour de Cassation d'Italie, Diplomé de l'Institut de Hautes Etudes Internationales de Genève. Preface by B. Mirkine-Guetzévitch, Professeur à l'Institut des Hautes Etudes Internationales de l'Université de Paris, Secrétaire Général de l'Institut International de Droit Public. (Paris : Rousseau & Co., 1931.) 2nd edition. Pp. 366. Price 50 francs.

[2] *Annuaire Interparlementaire* by Leopold Boissier and B. Mirkine-Guetzévitch. (Paris : Delagrave.) Pp. 747. Price 125 francs.

Here we have another *Annuaire* breaking new ground. It is fathered by two international bodies, the *Union Interparlementaire* and the *Institut International de Droit Public,* and its preparation has required the help of many collaborators. What it sets out to do is to describe shortly the constitution of each of fifty-four countries, to give a brief biography of ministers in office, to explain the composition of the legislative chambers and their methods of procedure, to give a brief account of the different political parties, a summary of the budget for the last year, the titles of the principal laws passed and treaties ratified and a brief sketch of the most important political events of the year in each country.

As it covers 1930 and even includes some events of January 1931 it is a *tour de force* to have produced such a work before the end of the first quarter of 1931. There is no question that the work will be extremely useful. As its scope is limited to countries which have representative institutions, it has nothing to say about the French colonial empire, though it gives a good account of the government of India and of the British Dominions.

The political information is remarkable for its freshness and " actuality." To some extent the book covers the same ground as the *Statesman's Year Book,* though the scope of that excellent publication is much wider. On the political side, however, the *Annuaire* contains a good deal that we do not find in the *S.Y.B.* ; *e.g.* as to France, it mentions the constitutional " conventions " which so greatly limit the powers of the President, it describes the rôle of the *sous-secrétaires* and *the haut-Commissaires,* as to both of which there are developments, and it explains the functions of the *Conseil National Economique.* As to England, it is so up-to-date as to give the resolutions of the Imperial Conference of 1930 and to mention the dissident groups in the Liberal party and the party of Sir Oswald Mosley. The brief accounts of the programmes of the various political parties in the different countries—a task singularly simplified in Italy and Russia—are, so far as we can judge, quite excellent.

We notice one or two slight slips. " Rt. Hon. Viscount Freeman Willingdon " is a very excusable mistake, but it gives one a shock to read that the last exercise in England of the Royal veto was in 1907, though this no doubt is a misprint for 1707. Nor is it correct to say that hereditary peers cannot take their seats till they are 27, but this also is probably a misprint for 21.

The *Annuaire* is proposing to publish gradually a French translation of the parliamentary rules of the different countries, and this volume gives these rules for the *Reichstag,* the American " House " and the French and Italian Chambers of Deputies.

BIBLIOGRAPHY OF FRENCH LAW AND OF THE POLITICAL, ECONOMIC AND SOCIAL SCIENCES.[1]

GIVES full indications as to all the French books for 1930 in these subjects and also of all the *thèses* and the anonymous articles in periodicals.

COMPARATIVE STUDY OF MODERN LAW.[2]

THIS monumental work, packed with information, marches steadily on. The first two volumes have been reviewed in this *Journal*.[3] Vol. I, in two parts, gave excellent general surveys of the systems of law of all the principal countries of the world. With Vol. II began the systematic exposition of legal topics in alphabetical order.

The last *Lieferung* which completes Vol. III comes down to *Grundstück*, so that approximately half the ground has been covered in this part of the work. So far as we can judge it is exceedingly well done, and one is struck particularly by the careful treatment of commercial matters. But for the language barrier we should expect the book to be widely used in England.

PROTECTION OF MINORITIES.

THIS is a valuable attempt [4] to restate the international regulation of the protection of minorities in purely legal terms. The author gives a lucid enumeration of the instruments creating the law concerning the minorities. In his discussion of the subjects and objects of the minorities' rights and obligations he shows a somewhat rigid adherence to orthodox views, and declines to give his support to the opinion which sees in these provisions an important development in the structure of international law. He then gives a detailed analysis of the obligations of the several states under the minority provisions and of the international guarantees calculated to secure their fulfilment. The monograph is a reliable guide to the legal aspects of the relevant practice of the Council of the League and of the Permanent Court of International Justice.

We have also to acknowledge: [5]

Nationality within the British Commonwealth of Nations. By E. F. W. Gey van Pittus. (London: P. S. King & Son, Ltd.) Pp. xvi + 238. Price 10s.

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[1] *Bibliographie Générale des Sciences Juridiques, Politiques, Economiques et Sociales*, Année 1930. (Sirey, Paris, 1931.)

[2] *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes*, herausgegeben von Dr. Franz Schlegelberger, Dritter Band, (Vahlen, Berlin, 1931.)

[3] Third Series, vols. x, pt. iv, p. 348; xi, pt. iv, p. 304.

[4] Angelo Piero Sereni, *Il diritto internazionale delle minoranze*. Extract from *Rivista di diritto internazionale* of 1929 and 1930. Pp. 82.

[5] Mention here does not preclude a later review.

The Law of Mortgages of Land. By J. D. Falconbridge, M.A., LL.B., K.C. (Toronto: Canada Law Book Co.) Pp. lxxix + 807.

Arbitration Principles and the Industrial Court. By Mary Theresa Rankin, M.A., D.Phil. (London: P. S. King & Son, Ltd.) Pp. viii + 178. Price 7*s.* 6*d.*

The Economic Uses of International Rivers. By Professor H. A. Smith. (London: P. S. King & Son, Ltd.) Pp. ix + 224. Price 10*s.* 6*d.*

The League Committees and World Order. By H. R. G. Greaves. (London: Humphrey Milford, Oxford University Press.) Pp. xi + 266. Price 14*s.*

Muhammadan Law: An Abridgement according to its Various Schools. By Seymour Vesey-FitzGerald. (London: Humphrey Milford, Oxford University Press.) Pp. xvi + 252. Price 15*s.*

Problems of the German-American Claims Commission. By Wilhelm Kiesselbach, Dr. jur. Translated by Edwin H. Zeydel. (London: Oxford University Press.) Pp. 135. Price 6*s.* 6*d.*

International Adjudications, Ancient and Modern. Edited by J. Bassett Moore. 2 vols. Pp. cxiii + 513 and xv + 503. Price 25*s.*

The Mixed Courts of Egypt. By Jasper Y. Brinton. (London: Humphrey Milford, Oxford University Press.) Pp. xxvii + 416. Price 22*s.* 6*d.*

The Grotius Society Transactions. Vol. XVI. (London: Sweet & Maxwell, Ltd.) Price 10*s.*

The Permanent Court of International Justice. By Sir Cecil Hurst, G.C.M.G., K.C.B., LL.D., K.C. (London: The Solicitors' Law Stationery Society, Ltd.) Price 2*s.*

The International Law Association. Report of the 26th Conference. (London: Sweet & Maxwell, Ltd.) Pp. clxviii + 626. Price £2.

Seventh Annual Report of the Permanent Court of International Justice. Series E. No. 7. (Leyden: A. W. Sijthoff.)

The British Year Book of International Law, 1931. (London: Humphrey Milford, Oxford University Press.) Pp. vi + 271. Price 16*s.*

History of the Law of Distress for Rent and Damage Feasant. By F. A. Enever. (London: George Routledge & Sons, Ltd.) Pp. xxxi + 325. Price 15*s.*

The Civil Code of the Republic of China. Translated by Ching-Lin Hsia, James L. E. Chow and Yukon Chang.

The Annual Register, 1930. New Series. Edited by M. Epstein, M.A., Ph.D. (London: Longmans, Green & Co., Ltd.) Pp. xii + 176. Price 30*s.*

Laws of British Guiana, 1930. Vols. I–VI. (London: Crown Agents for the Colonies.) Price £6 6*s.* cloth bound; £5 5*s.* stiff paper bound.

Laws of Northern Rhodesia, 1930. 2 vols. (London: Crown Agents for the Colonies.) Price £3 3*s.* half calf; £2 2*s.* legal buckram.

Laws of the Somaliland Protectorate, 1930. 2 vols. (London: Crown Agents for the Colonies.) Price £1 per volume.

The Interstate Commerce Commission. Part I. By I. L. Sharfman. (New York: The Commonwealth Fund.) Pp. xvi + 317. Price $3.50.

Das Recht der nationalen Minderheiten. By Dr. jur. Georg H. L. Erler. (Münster: Aschendorff.) Price R.M. 17.50.

Die Aktienrechte der Gegenwart. By Dr. Walter Hallstein. (Berlin: Franz Vahlen.) Price R.M. 17.50.

Kommentar zum internationalen Arbeitsrecht. By Dr. Ernst Berger, Ewald Kuttig and Dr. Herbert Rhode. (Berlin: Franz Vahlen.) Price R.M. 18.

Etude sur les Voies d'Exécution en Droit Anglais. By Madame Amouroux-Ménard. (Paris: Rousseau & Cie.) Pp. xix + 505. Price Frs. 60.

Adatrechtbundels, XXXII, *Zuid-Sumatra,* pp. 468; XXXIII, *Gemengd,* pp. 482. (The Hague: Martinus Nijhoff.) Price Gld. 5.50 per volume.

Code des Prisonniers de Guerre. By Gustav Rasmussen. (Copenhagen: Levin & Munksgaard.) Pp. 147.

The following periodicals are also received; American Bar Association Journal; American Journal of International Law; American Political Science Review; Aperçu Statistique du Commerce Extérieur de la République Tchécoslovaque; Bolletino della Emigrazione; Bulletin de la Société italienne pour les Études de Droit industriel; Bulletin officiel du Congo Belge; Bulletin statistique de la République Tchécoslovaque; Calcutta Weekly Notes; Canadian Bar Review; Chinese Social and Political Science Review; Columbia Law Review; L'Egypte Contemporaine; Gesetzgebung und Rechtspraxis des Auslandes; Gold Coast Review; Headway; Hindustan Review; Instituto Ibero-Americano de Derecho Comparado publications; International Labour Office Bulletin; International Labour Review; International Review of Agricultural Economics; International Year Book of Agricultural Legislation; Journal du Droit International (Clunet); Journal of the Parliaments of the Empire; Juridical Review; La Giustizia Penale; La Procedura Penale Italiana; Law Quarterly Review; League of Nations Journal; Madras Law Journal; National Municipal Review; New York University Law Quarterly Review; Rapports Judiciaires de Quebec; Revista de Ciencia Juridicas y Sociales; Revista de Derecho jurisprudentia; Revista de Identificacion y Ciencias penales; Revue de Droit International et de Législation Comparée; Revue Internationale de la Croix Rouge; Revue Internationale de l'Enfant; Social Sciences Quarterly; South African Law Journal; Studi di Diritto Industriale; University of Illinois Studies in the Social Sciences; Wisconsin Law Review.